(1) Supreme Court, U.S.
FILED
95 171 JUL 27 1995
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

THEODORE S. PAPAILA,

Petitioner,

v.

UNIDEN AMERICA CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JANETTE JOHNSON
JANETTE JOHNSON & ASSOCIATES
2601 Welborn Street
Dallas, Texas 75219
214 522 4090 (telephone)
214 522 4092 (fax)

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED:

1. Does Respondent, a corporation incorporated under the laws of the United States, have standing to assert as an absolute bar to Title VII of the Civil Rights Act of 1964 claims of race and national origin discrimination, the rights of a second foreign corporation under the Treaty of Friendship, Commerce and Navigation between the United States and Japan merely because the American corporation is owned by the second foreign national corporation?

2. In any balancing of interests between United States law on the one hand and a United States Treaty on the other, does the Supremacy Clause of the United States Constitution, as well as the rules of statutory construction and interpretation, require that United States law should take precedence over foreign treaties?

3. Does a conflict in the circuits require resolution by this Court of the important federal question arguably left open in this Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 190 n.19 (1982) as to the rights of an American based corporation to assert the treaty rights of its parent?

4. Does the opinion of the Fifth Circuit herein conflict with this Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982) by allowing Respondent to accomplish by indirection that which it can not do under this Court's decision in *Sumitomo*?

LIST OF INTERESTED PARTIES

Petitioner Theodore S. Papaila, an individual, and Uniden America Corporation

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF INTERESTED PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

I. OPINIONS BELOW 1

II. JURISDICTION 2

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

IV. STATEMENT OF THE CASE 2

A. Factual Background 2

B. Petitioner's Title VII Claims 3

C. Statement of Facts in Support of Petitioner's Title VII Claims 4

D. Corporate Structure of Respondent UAC ... 6

E. The Treaty of Friendship, Commerce and Navigation 6

F. Homogeneity of Japanese Society 6

V. REASONS FOR GRANTING CERTIORARI ... 7

A. Respondent, a Corporation Incorporated Under the Laws of the United States, Does Not Have Standing to Assert as an Absolute Bar to Title VII of the Civil Rights Act of 1964 Claims of Race and National Origin Discrimination, the Rights of a Second Foreign Corproation Under the Treaty of Friendship, Commerce and Navigation between the United States and Japan Merely Because the American Corporation is Owned by a Japanese National Corporation 8

TABLE OF CONTENTS – Continued

Page

1. Respondent, an American Corporation, Has No Standing Under the Treaty of Friendship, Commerce and Navigation to Assert any Rights Accorded to its Parent Corporation .. 8

2. Respondent Cannot Assert the Article VIII(1) Rights of Its Parent Corporation 10

3. By the Plain Language of the Treaty, There was no Intent to Permit United States Subsidiaries to Invoke the Article VIII(1) Rights to The Parent..... 11

B. In any Balancing of Interests Between United States Law on the One Hand and United States Treaty on the Other, the Supreme Clause of the United States Constitution, as well as the Rules of Statutory Construction and Interpretation Requires that the United States Law Should Take Precedence 13

1. Title VII of the Civil Rights Act is a Broad Based Statute Enacted to Elimitate All Vestiges of Discrimination ... 13

2. Purpose of the Treaty..... 15

3. The Rights Granted Under the Treaty are Limited and do not Include the Right to Engage in Discriminatory Treatment in the Terms and Conditions of Employment 16

TABLE OF CONTENTS – Continued

Page

4. Respondent engages in Discriminatory Treatment of American Employees, which is Beyond the Scope of Rights Granted Under the Treaty 18

5. Title VII Takes Precedence over the Treaty 19

C. A Conflict in the Circuits Requires Resolution by this Court of the Important Federal Question Arguably Left Open in this Court's Decision in *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176 (1982) as to the Rights of an American Based Corporation to Assert the Treaty Rights of its Parent as the Fifth and Seventh Circuits are in conflict with the Second Circuit... 20

D. The Opinion of the Fifth Circuit Herein is in Apparent Conflict with this Court's Decision in *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176 (1982)..... 22

1. Neither *Papaila* nor *Fortino* Correctly Distinguish or Interpret Supreme Court Precedent 22

2. *Fortino,* Relied upon by Papaila, Ignores Language in *Sumitomo* Which Does not Support the Invocation of Treaty Rigths by Subsidiaries 24

VI. CONCLUSION 26

TABLE OF AUTHORITIES

Page

Federal Cases

Avagliano v. Sumitomo Shoji America, Inc., 638 F.2d 552 (2nd Cir. 1981) rev'd 20, 21, 22, 23

Barrows v. Jackson, 346 U.S. 249 (1953)..... 9

Chew Heong v. United States, 112 U.S. 536 (1884)..... 19

Craig v. Boren, 429 U.S. 190 (1976) 9

Dothard v. Rawlinson, 433 U.S. 321 (1977)..... 19

Eisenstadt v. Baird, 405 U.S. 438 (1972)..... 9

Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991) 3, 21, 22, 23, 24

Goyette v. DCA Advertising, 66 Fair Empl. Prac. Cas. (BNA) 1045 (S.D.N.Y. 1993) 11, 21

Griswold v. Connecticut, 381 U.S. 479 (1965)..... 9

Johnson v. Browne, 205 U.S. 309 (1907)..... 19

MacNamara v. Korean Air Lines, 863 F.2d 552 (3d. Cir. 1988) cert. denied, 110 S. Ct. 349 (1989) 17

NAACP v. Alabama, 357 U.S. 449 (1958) 9

Papaila v. Uniden America Corp., 840 F. Supp. 440 (N.D.Tex. 1994)..... 1

Papaila v. Uniden America Corp., 51 F.3d 54 (5th Cir. 1995).....1, 21, 22, 23, 24

Spiess v. C. Itoh & Co., (America), Inc., 643 F.2d 353 (5th Cir. 1981) vacated, 457 U.S. 1128 (1982), on remand, 687 F.2d 129 (5th Cir. 1983), dismissed on other grounds, 725 F.2d 970 (5th Cir. 1984) 10, 12, 13, 15

TABLE OF AUTHORITIES – Continued

Page

Spiess v. C. Itoh & Co. (America) Inc., 725 F.2d 970 (5th Cir. 1984) 10

Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982) ..... *passim*

FEDERAL STATUTES

28 U.S.C. §1254(1) 2

42 U.S.C. §2000e *et seq.*, [Title VII] 1, 2, 13

4 U.S.T. 2063 ..... 2, 11, 17

H.R. Rep. No. 238, 92nd Cong., 1st Sess. 3 (1971), reprinted in 1964 U.S.C.C.A.N. 2137, 2140 14

H.R. Rep. No. 914, 88th Cong., 1st Sess. 26 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2402 14

LAW REVIEW ARTICLES

42 MINN. L. REV. 805 (1958) 15

50 AM. J. INT'L. L. 373, 386 (1956) 16

5 AM. J. COMP. L. 229, 230-31 (1956) 15

No. _____

In The

Supreme Court of the United States

October Term, 1995

THEODORE S. PAPAILA,

Petitioner,

v.

UNIDEN AMERICA CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

I. OPINIONS BELOW:

This appeal is from an opinion of the Fifth Circuit Court of Appeals, *Papaila v. Uniden America Corp.*, 51 F.3d 54 (5th Cir. 1995) (Appendix A) which decision affirmed *Papaila v. Uniden America Corp.*, 840 F.Supp. 440 (N.D.Tex. 1994) (Appendix B), a final judgment of the district court on Motion of the Respondent for Summary Judgment on Petitioner's claims of race and national origin discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, [Title VII].

II. JURISDICTION:

The Fifth Circuit Court of Appeals issued its opinion on April 28, 1995. Petitioner timely invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

The Supremacy Clause, Article VI, clause 2 of the Constitution, provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .

The pertinent sections of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, [Title VII] are contained at 42 U.S.C. §2000e-2(a). The Treaty of Friendship, Commerce and Navigation between the U.S. and Japan, April 2, 1953, is cited as U.S.-Jap., 4 U.S.T. 2063 [the Treaty]

IV. STATEMENT OF THE CASE:

A. Factual Background:

On May 19, 1993, Petitioner filed this lawsuit alleging, *inter alia*, that Respondent Uniden America Corporation unlawfully discriminated against him and discharged him due to his national origin and his race in violation of Title VII. On December 3, 1993, Respondent moved for summary judgment. On January 10, 1994, the Court ruled that Petitioner's claims of race and national origin discrimination were precluded by virtue of the

1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan.

The District Court determined that the protection of the Treaty entitles Respondent to discriminate in favor of its Japanese employees. In so ruling, the District Court relied on the holding of the Seventh Circuit in *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991) (RE 3; V.4 p. 778-791), that an American subsidiary corporation of a Japanese corporation is entitled to assert all treaty rights of its parent corporation. Petitioner timely appealed to the United States Court of Appeals for the Fifth Circuit which court upheld grant of summary judgment. The Fifth Circuit, aligned with the Seventh Circuit, and held that an American corporation had standing to assert the treaty rights of its Japanese parent.

B. Petitioner's Title VII Claims:

Petitioner asserts that he was discriminatorily demoted and discharged because of his race and national origin. He also asserts that Japanese employees are given preferential treatment, including a different pay and benefits scale than non-Japanese employees, and most critically, are further given preferential treatment in application of Respondent's discipline and discharge procedures, including transfer rather than discharge in non-performance or under-performance situations.

C. Statement of Facts in Support of Petitioner's Title VII Claims:

Petitioner held the position of Vice-President-Government Sector or Vice President Market Development from June 1988 through March 1990. He then held the position of Vice-President Marketing, Commercial Communications Division from April 1990 through March 1992 (RE 2). As of April 1, 1992, Petitioner was demoted into a direct sales position (RE 2; V.4 p. 760-762; RE 6; V.2 p. 417-419, referring to V.3 pp. 521, 522; and V.2 p. 492).

Petitioner desired assignment to the mere favorable Canadian territory. He was told by his superior, Steven Fulford, a Corporate Vice-President, in a conversation relating to Petitioner's job opportunities, that he could not discuss any opportunities in Canada with him. (Re 2, 6; V.2 p. 420, referring to V.2 p. 493; V.4 p. 763). Vice President Fulford then assigned Masaki Hara to Canada in approximately April 1992 along with another employee (RE 6; V.2 p. 420, referring to V.3 p. 525). Masaki Hara is a Japanese "expatriate" then living in the United States (Re 2; V.4 p. 764; RE 6; V.2 p. 420, referring to V.3 pp. 583, 586, 540).

Mr. Hara did not do well from a sales point of view in Canada and he did not achieve his quota. Masaki Hara is still employed by Respondent and has been promoted to the position of managing the Marine Division (RE 6; V.2 p. 420, referring to V.3 pp. 538-539, 583, 587).

Petitioner also assertedly had performance and quota problems. He was terminated from the employ of the Respondent on January 4, 1993 (RE 2; V.4 p. 765). Petitioner was told by Mr. Huffman and Mr. Fulford that

"Japan" ordered his termination (RE 6; V.2 p. 421, referring to pp. 497-8).

Respondent has approximately sixteen Japanese "expatriate" employees who were hired in Japan by Uniden Corporation, the parent Japanese corporation and sent to Respondent by the parent Japanese corporation. These expatriate employees occupy managerial positions at Respondent (RE 2; V.4 p. 766). The base salary of the expatriate employees is based on the pay scale for employees working in Japan for the parent Japanese corporation (RE 2; V.4 p. 766). The pay scale is different than that used to pay American managerial employees (RE 6; V.2 p. 421; referring to V.2., 301).

Japanese expatriate employees have not been terminated when they were perceived to have performance problems. Mr. Fulford expressed the view that the Japanese expatriate employees are subject to different rules than the American employees. (RE 6; V.2 p. 422 and references therein; RE 2; V.4 p. 767). Japanese expatriates assigned to Respondent are eligible to receive the following in addition to their "base" salary and bonus plan: hardship allowance; working day allowance; housing and furniture allowance; away from home allowance; car or car allowance; tuition allowance; and medical insurance allowance. Examples given by Mr. Fulford of further differences in treatment include: cars provided to Japanese employees; different pay plans; and a clique from which Americans are excluded.

Petitioner is a caucasian United States Citizen of American national origin (RE 2; V.4 p. 759). Petitioner complained to Mr. Fulford of a double standard in the

way Japanese were treated. Petitioner has heard other employees, including Mr. Fulford, make remarks to the effect of "we are not Japanese" (RE 6; V.2 p. 423, and references therein). At no time below did the Respondent raise citizenship as the distinction in the treatment of its expatriate employees (V.2 pp. 237-248, 297-304).

D. Corporate Structure of Respondent UAC:

Respondent is an Indiana Corporation and an American subsidiary of Uniden Corporation, a Japanese Corporation based in Tokyo, Japan (RE 7; V.2 p. 298). As an American corporation, it enjoys all the benefits afforded to companies that choose to incorporate in America.

E. The Treaty of Friendship, Commerce and Navigation:

Under the Treaty of Friendship, Commerce and Navigation, April 2, 1953, U.S.-Jap., 4 U.S.T. 2063 [the Treaty], Japanese corporations have the right, if they so choose, to incorporate under the laws of the United States. Once they do so, they are an American corporation, subject to American laws (RE 6; V.2 p. 433, referring to V.3 p. 595).

F. Homogeneity of Japanese Society:

Japanese society is remarkable in its homogeneity. Ninety-nine percent of the population of Japan is composed of individuals of Japanese ethnic origin. RONALD E. DOLAN and ROBERT L. WORDEN, JAPAN, A COUNTRY STUDY,

(1990); Brief for Petitioner and Cross-Respondent at 17-18, *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, (1982) (RE 6; V.4; p. 437). Respondent presented no evidence to rebut that finding or to present evidence that said Japanese ex-patriates were not of Japanese national origin.

V. REASONS FOR GRANTING CERTIORARI:

Petitioner respectfully submits that there are four reasons, as more fully articulated herein, that this Court should grant certiorari herein. First, Petitioner asserts that an American corporation can not assert as an absolute bar to the laws of the United States the fact that its parent Japanese company, but not itself, has certain treaty rights. In short, an American corporation has no standing to assert any such rights of a foreign corporation situated in an arms length relationship with itself.

Secondly, in any balancing of interests between United States law and United States treaties, petitioner asserts that the Supremacy Clause of the United States Constitution as well as the rules of statutory construction and interpretation require that the United States laws take precedence or, at the least, enjoy a greater accommodation to Treaty rights than granted herein.

Thirdly, there is a conflict in the circuit courts which requires resolution by this Court of the important federal question arguably left open in this Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, (1982) as to the rights of an American based corporation to assert the Treaty rights of its parent. Specifically, the

Fifth and Seventh Circuits are in conflict with the Second Circuit.

Lastly, Petitioner respectfully asserts that the opinion of the Fifth Circuit herein is in apparent conflict with this Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176 (1982) and attempts to accomplish by indirection what this Court has prohibited directly.

A. Respondent, a Corporation Incorporated Under the Laws of the United States, Does Not Have Standing to Assert as an Absolute Bar to Title VII of the Civil Rights Act of 1964 Claims of Race and National Origin Discrimination, the Rights of a Second Foreign Corporation Under the Treaty of Friendship, Commerce and Navigation between the United States and Japan Merely Because the American Corporation is Owned by a Japanese National Corporation:

1. Respondent, an American Corporation, Has No Standing Under the Treaty of Friendship, Commerce and Navigation to Assert any Rights Accorded to its Parent Corporation:

In granting absolute standing for one corporation to assert all of the rights of a second, the Fifth Circuit has attempted to answer the question specifically left open by footnote 19 of this Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 190 n.19 (1982) in which this Court stated that: "We also express no view as to whether Sumitomo may assert any Article VIII(1) rights of its parent."

In deciding in the affirmative, however, Petitioner respectfully asserts that the Fifth Circuit has ignored Supreme Court precedent. Thus, this Court has been exceedingly hesitant to allow a litigant to base a claim or a defense on the rights of a person not before the Court. *See Barrows v. Jackson,* 346 U.S. 249, 255 (1953).

This Court has taken two approaches in allowing parties to assert the rights of third parties: one approach examines the relationship between the litigant and the third party. *See, e.g. Griswold v. Connecticut,* 381 U.S. 479 (1965); *Barrows v. Jackson,* 346 U.S. 249 (1953); *NAACP v. Alabama,* 357 U.S. 449 (1958). The other examines the impairment of rights of the third party. *See, e.g. Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Craig v. Boren,* 429 U.S. 190 (1976).

Under neither test does Respondent have standing herein. Thus, while undoubtedly there is a relationship between the parent Japanese corporation, Uniden Corporation, and its American incorporated subsidiary, Respondent UAC, the two nevertheless are arms-length corporate entities and as such both corporations enjoy all the protections and shields afforded under the corporate structure. No attempt has been made by Respondent to pierce the "corporate veil" herein, no evidence has been presented by Respondent that would allow this Court to pierce such corporate veil and there is no assertion that the second American corporation is but a mere sham corporation indistinguishable from the first.

Secondly, there has been no impairment of rights of the second party not before the Court. Thus, as this Court has readily held in cases involving Japanese corporations,

such corporations, when themselves involved in litigation, are perfectly capable of enforcing their own statutory treaty rights. *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176 (1982). Moreover, the second corporation enjoys no unfettered right to order an American corporation to violate American laws.

2. Respondent Cannot Assert the Article VIII(1) Rights of Its Parent Corporation:

Respondent is an American corporation with no rights under Article VIII(1) of the Treaty. Therefore, Petitioner respectfully asserts that it cannot assert the Treaty rights of its Japanese parent. *See Spiess v. C. Itoh & Co., (America), Inc.,* 643 F.2d 353 (5th Cir. 1981) *vacated,* 457 U.S. 1128 (1982), *on remand,* 687 F.2d 129 (5th Cir. 1983), *dismissed on other grounds,* 725 F.2d 970 (5th Cir. 1984). In the district court's decision in *Spiess,* on remand, the court found that:

> The defendant, by contending that it has standing to assert the substantive treaty rights of its parent, is attempting to accomplish indirectly what it cannot accomplish directly. The Court does not believe that either the Treaty or the *Sumitomo* case would permit that to occur. Accordingly, defendant's motion to dismiss for failure to state a claim is denied *in toto.*

Spiess v. C. Itoh & Co. (America) Inc., 725 F.2d 970, 973 (5th Cir. 1984) (*Spiess III*), citing the district court. Clearly, as articulated by the district court in the *Spiess III* case, neither the Treaty nor the *Sumitomo* case support the subsidiary's invocation of the parent's Article VIII(1) Treaty rights. A similar conclusion was reached by a

district court in the Second Circuit in *Goyette v. DCA Advertising*, 66 Fair Empl. Prac. Cas. (BNA) 1045, 1054 (S.D.N.Y. 1983) ("the FCN Treaty does not give Japanese corporations any increased privilege to discriminate on the basis of national origin." *Id.* at n. 18).

3. By the Plain Language of the Treaty, There was no Intent to Permit United States Subsidiaries to Invoke the Article VIII(1) Rights of The Parent:

The plain language of the Treaty does not indicate an intent to permit United States subsidiaries to invoke the Article VIII(1) rights of their parents. Thus, under normal principles of statutory interpretation, if a party is specifically enumerated in one section of a statute but omitted from a similar enumeration in another section, the exclusion is held to be intentional. This was done by the drafters of the treaty.

The language of the Treaty permits some of its provisions to be invoked by "nationals of [Japan]," some by "companies of [Japan]," and still others by "enterprises controlled by companies of [Japan]." 4 U.S.T. 2066 (April 2, 1953). By categorically separating wholly-owned subsidiaries "enterprises controlled by companies of [Japan]" from Japanese corporate parents "companies of [Japan]," the Treaty, by its plain language, intends that controlled companies can only invoke the rights expressly conferred on them in the Treaty.

It is no mere accident that the Treaty uses three wholly different terms for nationals, companies and enterprises controlled by companies. *See* Brief of United

States as Amicus Curiae at 2, *Sumitomo Shoji America, Inc. v. Avagliano, et al.*, Nos. 80-2070, ("The conclusion that the Parties did not intend for enterprises incorporated in the United States but controlled by a Japanese company to invoke the Article VIII(1) employment privilege is reinforced by the fact that elsewhere in the Treaty the Parties expressly conferred rights on such controlled enterprises." *Id.* "The very creation of these three terms of art is a strong indication that the drafters viewed each as representing a distinct entity." *Spiess*, 643 F.2d at 365 (Reavley, J., dissenting).

In his well reasoned dissent, Judge Reavley goes on to explain:

> Articles VII(1), VII(4), XVI(2), VI(3) and VI(4) (read in conjunction with paragraph 2 of the Protocol), grant express rights to "nationals and companies of either Party" operating in the territory of the other party and then *specifically extend* the same or similar rights to "enterprises controlled by such nationals or companies."

Id., at 366-67, footnotes omitted (emphasis in original). Thus, the inclusion of "enterprises controlled by such nationals or companies" in the same sections as "companies of either Party" would be redundant if the drafters of the Treaty intended that the "enterprises controlled by such nationals or companies" could also assert the rights of the "companies of [either Party]." *Id.*, at 366-67.

The drafters of the Treaty clearly intended for some Articles to apply only to certain entities. Article VIII(1) was intended to apply only to "Nationals and companies of either Party." Only if the Treaty was completely silent

as to "enterprises controlled by such nationals or companies," would another interpretation be consistent with the Treaty's language. However, given that the drafters used the "enterprises controlled" language for five provisions within the Treaty, but not Article VIII(1), their exclusion from Article VIII(1) is more than a mere oversight.

Thus, the correct statutory interpretation is that Article VIII(1) does not include "enterprises controlled" by Japanese corporations. To use the words of Judge Reavley, granting subsidiaries the right to assert Treaty rights would "blatantly duplicate grants of rights." *Spiess*, 643 F.2d at 367.

B. In any Balancing of Interests Between United States Law on the One Hand and a United States Treaty on the Other, the Supremacy Clause of the United States Constitution, as Well as the Rules of Statutory Construction and Interpretation Requires that the United States Law Should Take Precedence:

1. Title VII of the Civil Rights Act is a Broad Based Statute Enacted to Eliminate All Vestiges of Discrimination:

A mere thirty years ago, Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-20002-17, grounded firmly on the Commerce clause of the United States Constitution intending to "remove obstructions to the free flow of interstate commerce and foreign commerce and to insure the complete and full enjoyment by

all persons of the rights, privileges and immunities secured and protected by the Constitution."[1]

The Act reflects "the commitment of Congress to the goal of equal employment opportunity for all our citizens."[2] It now stands as the centerpiece of an entire panoply of protections to end employment discrimination in the American work place. Its purpose is to eradicate discrimination on the basis of race, color, national origin, sex and religion.

In order to effectuate such purpose, the employment practices outlawed in Title VII are very broadly defined. Section 703(a)(1) bans discrimination by employers; Section 703(a)(2) bans segregation in the work place. So too, the definition of employer is extremely broad as Section 701(b) encompasses most all but the very small employer. Moreover, as amended in 1972, 1978 and 1991, Title VII enables the federal courts as well as the Equal Employment Opportunity Commission ("EEOC") to review the hiring, training, promotion and termination practices of employers as well as almost all labor unions and employment agencies. By so doing, Congress sought to create a statute to provide a broad based law of wide jurisdiction and meaningful remedies to eradicate societal discrimination on the basis of race, national origin, sex and religion.

---

[1] H.R. Rep. No. 914, 88th Cong., 1st Sess. 26 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2402.

[2] H.R. Rep. No. 238, 92nd Cong., 1st Sess. 3 (1971), reprinted in 1964 U.S.C.C.A.N. 2137, 2140.

2. Purpose of the Treaty:

The Japanese-American Treaty, enacted eleven years prior to Title VII, is only one in a long line of Friendship, Commerce and Navigation treaties between the United States and other nations. The central theme of these treaties has remained essentially constant since the first treaty was signed between the United States and France in 1778. This theme is to provide a medium by which two nations could "provide for the rights of each country's citizens, their property and other interests, in the territories of the other, and for the rules mutually to govern their trade and shipping." *Id. Citing,* Herman Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practices,* 5 AM. J. COMP. L. 229, 230-31 (1956). Stated another way, the objective of the treaty is "to secure non-discrimination, or equality of treatment: a sort of equal protection of the laws objective." Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation,* 42 MINN. L. REV. 805 (1958).

The purposes of the treaties is for citizens of each county to have the same rights in a foreign country as the citizens of the host country. As noted by the Fifth Circuit in *Spiess v. C. Itoh & Co. (America), Inc.,* 643 F.2d 353, 359 (5th Cir. 1981), however, the objective to achieve such "national treatment" was not always possible. *Id.* Thus, where such equal protection of the laws was not achievable, the treaties sought treatment at least as favorable as the citizens of any other foreign nation. *Spiess,* 634 F.2d at 360; *see also, Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 188, n. 18 (1982).

Nowhere in the treaties is it intended by the negotiators or authors for a foreign national to be given superior rights to the citizens of the host country. *See Sumitomo*, 457 U.S. at 188 ("The purpose of [the treaty] was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage"). Very specifically, nowhere in the treaties was it intended for a Japanese corporation to be able to order an American corporation to treat its American employees differently and more severely than its Japanese ex-patriate employees especially in the critical areas of differences in treatment as to the standards for discharge, discipline and/or transfer of employees.

Thus, the purpose of such provisions as the "of their choice" language of VIII(1) of the United States-Japan Treaty was to "prevent the imposition of ultra-nationalistic policies with respect to essential executive and technical personnel." Herman J. Walker, *Provisions on Companies in U.S. Commercial Treaties*, 50 AM. J. INT'L. L. 373, 386 (1956). This provisions would prevent the host country from forcing an unfair quota system on foreign corporations. The purpose of the "of their choice" provision was not to allow foreign corporations, much less American subsidiaries of foreign corporations, the right to wholly ignore American statutes, including Title VII.

3. The Right Granted Under the Treaty are Limited and do not Include the Right to Engage in Discriminatory Treatment in the Terms and Conditions of Employment:

Article VIII(1) of the Treaty reads:

> Nationals and companies of either Party shall be *permitted to engage*, within the territories of the

> other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.

Treaty, 4 U.S.T. at 2070 (emphasis added).

Under a strict reading, the phrase "permitted to engage" would allow for the placement of Japanese nationals in certain positions within the United States. The Treaty does not permit discrimination in the treatment of American citizens by Japanese corporations, and it does not follow that the right of placement includes the right to preferential treatment of such personnel in a manner inconsistent with federal laws prohibiting discrimination.

A strict interpretation does not provide foreign businesses shelter from any federal employment laws except as far as the laws conflict with the business' Treaty right to place its own nationals in certain delineated positions, a right not at issue in this case. *See MacNamara v. Korean Air Lines*, 863 F.2d 552 (3d. Cir. 1988) *cert. denied*, 110 S.Ct. 349 (1989). In interpreting the Korean Treaty, which contains language substantially similar to the Japanese Treaty, the *MacNamara* court stated:

> In short, this history persuasively demonstrates that the target of Article VIII(1) was domestic legislation that discriminated on the basis of citizenship and that the provision was necessary *for the limited purpose* of securing to foreign investors *the freedom to place* their own citizens in key management positions. . . .

MacNamara, 863 F.2d at 869 (emphasis added). The court further stated:

> If [Article VIII(1)] is interpreted to confer an immunity from Title VII and the ADEA in connection with personnel decisions involving citizens of the foreign company's country, it would give foreign businesses a right not possessed by domestic employers. *Id.*

4. Respondent engages in Discriminatory Treatment of American Employees, Which is Beyond the Scope of Rights Granted under the Treaty:

As noted above, Respondent pays its Japanese "expatriate employees" under a different pay scale than that used for non-Japanese expatriate employees. Additionally, they are entitled to additional fringe benefits not provided to non-expatriate employees. Very critically herein, Petitioner also asserts that Japanese employees are provided preferential treatment when they are unsuccessful in the course of their employment with UAC, in that they are held to different – lesser – standards of performance, and transferred rather than discharged.

Petitioner presents to this court a very simple proposition, that is, that once employees are placed in the corporate structure of Respondent UAC, the differential treatment engaged in by Respondent, an American corporation, on behalf of Japanese expatriate employees results in illegal discrimination as defined in Title VII against persons not of Japanese origin.

5. Title VII Takes Precedence over the Treaty:

Even assuming *arguendo,* that the Respondent, an American Corporation, could assert the Treaty rights of its Japanese parent, under a traditional conflict of laws analysis, because federal statutes like Title VII and treaties are generally accorded the same level of authority, when there is a conflict between the statute and the treaty, the last in time controls. *See Chew Heong v. United States,* 112 U.S. 536 (1884).

Thus, given the 1964 effective date of Title VII, clearly any unresolved conflict between the Treaty of 1953, and the anti-discrimination laws should be resolved in favor of Title VII.

Further, to avoid repealing laws by implication, this Court has consistently held that statutes and treaties should be read in harmony whenever possible. *See Johnson v. Browne,* 205 U.S. 309 (1907). Reading Title VII and the Treaty in such harmony: the Treaty may grant Japanese companies the right to the *placement* of personnel in certain delineated positions within subsidiary corporations, generally managerial or technical; and Title VII allows for employment preferences under some limited circumstances. *See e.g., Dothard v. Rawlinson,* 433 U.S. 321, 334-337 (1977). Reading the Treaty and Title VII in harmony thus allows for the *limited* right of preferential placement of Japanese individuals into delineated positions of management and positions requiring technical expertise. However, it does not follow that because the company has the limited right of placement it also may discriminate in the *treatment* of Japanese employees as opposed to American employees or to discriminate by

placing such ex-patriates in non-technical sales positions with favored territories or regions such as the Canadian region herein.

C. A Conflict in the Circuits Requires Resolution by this Court of the Important Federal Question Arguably Left Open in this Court's Decision in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), as to the Rights of an American Based Corporation to assert the Treaty Rights of its Parent as the Fifth and Seventh Circuits are in conflict with the Second Circuit.

In *Avagliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2nd Cir. 1981) *rev'd and remanded on other grounds*, 457 U.S. 176 (1982), the Second Circuit directly decided the question of whether the "freedom-of-choice" language of Article VIII of the Treaty exempts a Japanese Company from Title VII of the Civil Rights Act of 1964 as far as the company's executive personnel are concerned. The Court held that "the treaty does not have such effect." *Id.*, 638 F.2d at 558. The court went on to explain that the "freedom-of-choice" language does not give Japanese companies license to violate American laws prohibiting discrimination in employment. *Id.* The court further held that

> "[s]ubjecting a Japanese company to Title VII is consistent with the language and purpose of Article VIII of the Treaty, since Title VII, construed in the light of the Treaty, would not preclude the company from employing Japanese nationals in positions where such employment

> is reasonably necessary to the successful operation of its business."

Id. 638 F.2d at 559 (recognizing the *bona fide* occupational qualification provisions of Title VII allows for a construction of Title VII and the Treaty in a manner that would give due weight to the Treaty rights and the "unique treaty requirements" of a Japanese company doing business in the United States. *Id.*)

Avagliano was later reversed and remanded by this Court upon a finding that a wholly-owned subsidiary of a company of Japan was not a "Company of Japan" for Treaty purposes, and therefore was not entitled to the benefits of the Treaty. *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 189 (1982). Because the decision of the Supreme Court was on different grounds, the Second Circuit opinion in the *Avagliano* case is still "alive and well" for purposes of determining this question. *See, Goyette v. DCA Advertising,* 66 Fair Empl. Prac. Cas. (BNA) 1045, 1064 (S.D.N.Y. 1993) ("the FCN Treaty does not give Japanese corporations any increased privilege to discriminate on the basis of national origin." *Id.* at n. 18)

The Seventh Circuit and the Fifth Circuit, however, are in direct conflict with the decision of the Second Circuit in *Avagiliano.* Both courts have clearly held that a subsidiary may assert the treaty rights of its parents, apparently including in those rights the right to discriminate against non-Japanese executives "at-will." *Papaila v. Uniden America Corp.,* 51 F.3d 54, 56; *Fortino v. Quasar,* 950 F.2d 389 (7th Cir. 1991). Neither the Fifth nor the Seventh Circuit question the rights of the Japanese parent to favor

Japanese citizens in placing employees to manage its shareholder interest in violation of Title VII. Neither circuit attempts to read the Treaty and Title VII in harmony, as is required under the Supremacy Clause and the rules of statutory construction and interpretation, choosing instead to give a carte blanche broad reading to the "freedom-of-choice" language of the Treaty. In so doing, the courts over accommodation to Treaty concerns nullifies Title VII rights in an American corporation to American employees in disregard of the Supremacy Clause of the United States Constitution and the rules of statutory construction and interpretation.

The holdings of the Fifth and Seventh Circuits in *Papaila* and *Fortino,* therefore, are in direct conflict with the established holding of the Second Circuit in *Avagliano.*

D. The Opinion of the Fifth Circuit Herein is in Apparent Conflict with this Court's Decision in *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176 (1982)

1. Neither *Papaila* nor *Fortino* Correctly Distinguish or Interpret Supreme Court Precedent:

In both *Papaila* and *Fortino,* the Courts endorsed a right to assign treaty rights of a Japanese parent company to its wholly owned subsidiary incorporated under the laws of the United States.

In the Second Circuit Court of Appeals, Sumitomo argued that Article VIII(1) protection was based upon the parent's Treaty right to control and manage its American

subsidiary and that deprivation of Article VIII(1) rights to the subsidiary would severely undercut its parent's Treaty rights. *See Avagliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552, 554, 556-557 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1981). Finding it unlikely that the Treaty would give Japanese companies the right to manage its United States subsidiaries yet bar those same subsidiaries from invoking treaty protection, the appellate court permitted Sumitomo, a United States subsidiary of a Japanese parent, to assert treaty rights as a "company of Japan." *Id.*

This Court specifically rejected this "right to assign" defense and precluded the United States, subsidiary from invoking Treaty rights.

In both *Papaila* and *Fortino*, Respondents argued that they must be allowed the standing to assert Article VIII(1) rights because a judgment against the subsidiary would supposedly set the treaty rights "at naught."

Thus, both the Fifth Circuit herein, and the Seventh Circuit, accepted virtually the same argument that this Court has emphatically rejected in *Sumitomo* and attempt to accomplish by indirection that which they cannot do directly. Thus, only the method of invoking Article VIII(1) differed: in *Papaila, Sumitomo* the defendant used the "company of Japan" approach; in *Fortino* the parent-right invocation method was used. The rationale for both methods is the same: the alleged derogation of the parent's FCN treaty rights by denial of Article VIII(1) rights to the subsidiary.

Furthermore, to the extent that both Courts rely on the absence of any contention on behalf of Sumitomo that the parent company directed its conduct, their reliance is misplaced as that alleged "missing" contention was argued both by brief and in oral argument. Thus both the Fifth Circuit and the Seventh Circuit wholly fail to establish any features which would properly distinguish the *Fortino* case or the *Papaila* case from the *Sumitomo* case.

2. Fortino Relied upon by Papaila, Ignores Language in *Sumitomo* Which Does not Support the Invocation of Treaty Rights by Subsidiaries:

The *Sumitomo* decision does not support the *Papaila* Court nor the *Fortino* Court's decision that the subsidiary must be allowed to assert its parent's Treaty rights. Even though this Court failed to reach a decision on this issue because of procedural defects in the manner in which the issue was raised, based upon the Court's analysis of the Treaty, the Court would have precluded the subsidiary invocation of treaty rights had the issue been properly raised.

First, this Court stated that United States branches of Japanese corporations would have advantages "conferred by Article VIII(1)" that the American subsidiaries would not have. *Sumitomo*, 457 U.S. at 189. The logical extension of this statement is that if the United States subsidiary is allowed to invoke the Treaty right of its parent, there would no longer be any advantage "conferred by Article VIII(1)" to the United States branch of Japanese corporations not incorporated in the U.S. which the subsidiary

does not also have. Second, in *Sumitomo*, this Court stated that "local subsidiaries . . . are entitled to the rights, and subject to the responsibilities of other domestic corporations." *Sumitomo*, 457 U.S. at 188. Taking this statement to its logical conclusion, if an American corporation has violated Title VII because of discriminatory practices dictated by their shareholders/owners, then an American subsidiary would be liable for the Title VII violation even if the discriminatory actions were dictated by its Japanese shareholder/owner.

The *Sumitomo* Court's language concerning the "responsibilities" of a domestic corporation, in order to remain in comity with Title VII, must be interpreted to block the parent-right invocation by U. S. subsidiaries of Japanese corporations.

Thus, whether the subsidiary attempts to invoke Treaty rights as a "company of Japan" or, as here, on behalf of its parent company, the result is the same, an American corporation attempting to assert Treaty rights not granted to it, to enable it to assert the rights and privileges of an American corporation, yet escape the responsibilities of compliance with American laws.

VI. CONCLUSION:

Therefore, for the reasons set forth herein, Petitioner Theodore Papaila respectfully requests that the writ of certiorari be granted.

Respectfully submitted

JANETTE JOHNSON
JANETTE JOHNSON & ASSOCIATES
2601 Welborn Street
Dallas, Texas 75219
214 522 4090 (telephone)
214 522 4092 (fax)

Counsel for Petitioner

APPENDIX A

Theodore S. PAPAILA, Plaintiff-Appellant,

v.

UNIDEN AMERICA CORP.,
Defendant-Appellee.

No. 94-10113.

United States Court of Appeals,
Fifth Circuit.

April 28, 1995.

Former employee of domestic subsidiary of foreign corporation brought action against subsidiary for employment grievances including discrimination based on race and national origin. On defendant's motion for summary judgment, the United States District Court for the Northern District of Texas, John H. McBryde, J., 840 F.Supp. 440, found discrimination claims were precluded by Friendship, Commerce and Navigation Treaty, and plaintiff appealed. The Court of Appeals, Duhé, Circuit Judge, held that subsidiary had standing to assert parent's rights under Treaty.

Affirmed.

Appeal from the United States District Court for the Northern District of Texas.

Before JONES, DUHÉ and STEWART, Circuit Judges.

DUHÉ, Circuit Judge:

Theodore Papaila sued Uniden America Corp. (UAC) alleging employment grievances including discrimination

based on race and national origin. On UAC's motion for summary judgment, the district court held that the race and national origin discrimination claims were precluded by the United States-Japan Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, art. VIII(1), 4 U.S.T. 2063, 2070. Plaintiff voluntarily dismissed his other claims and appeals the summary judgment. We affirm.

I. Background

UAC is an Indiana Corporation and a wholly owned subsidiary of Uniden Corporation, a Japanese entity based in Tokyo. Plaintiff, a caucasian of American national origin, alleges that Japanese citizens who are employees of UAC receive favorable treatment: they receive higher base salaries, fringe benefits (e.g., housing and tuition allowances), and job protection (transfer rather than discharge in case of poor job performance) that Plaintiff did not receive. Plaintiff was demoted then terminated by UAC.

The summary judgment evidence established that, of UAC's approximate 400 employees, only sixteen are Japanese citizens who were treated differently than other employees. Each of those sixteen employees, called by the parties "expatriates," was sent on a temporary work assignment by the Japanese parent to protect its interests in the subsidiary. The remainder of UAC's employees, including six of Japanese race and national origin (but not citizenship), were directly controlled by UAC and did not receive the same preferential treatment as the expatriates.

II. Treaty Provision

Under the Treaty a Japanese corporation may incorporate a subsidiary under the laws of the United States. Treaty, art. VII, 4 U.S.T. at 2068. Once it does so, the subsidiary is an American corporation, subject to American laws, including Title VII. Article VIII(1) of the Treaty provides, "[C]ompanies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." 4 U.S.T. at 2070. The Treaty allows a foreign corporation such as Uniden Japan to discriminate in favor of citizens from its own country in filling the specified high-level positions within the United States. *See Wickes v. Olympic Airways*, 745 F.2d 363, 367 (6th Cir.1984) (interpreting similar provision in United States-Greek Treaty of Friendship, Commerce & Navigation); *see also MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1145 (3rd Cir.1988) ("[T]he provision was necessary for the limited purpose of securing to foreign investors the freedom to place their own citizens in key management positions.") (interpreting similar provision in United States-Korean Treaty), *cert. denied*, 493 U.S. 944, 110 S.Ct. 349, 107 L.Ed.2d 337 (1989).

Thus, Article VIII to a limited extent permits Japanese companies to discriminate in favor of their fellow citizens because of their citizenship.

III. Standing to Assert Rights of Parent

As a domestic corporation, UAC has no rights under Article VIII(1), because Article VIII(1) applies only to "companies of [Japan]." *Sumitomo Shoji Am., Inc. v. Avagliano,* 457 U.S. 176, 189, 102 S.Ct. 2374, 2381, 72 L.Ed.2d 765 (1982) (holding that American subsidiary of a Japanese parent had no Treaty defense because the subsidiary was not a "company of Japan"). *Sumitomo* limited its ruling to the subsidiary's assertion of rights on its own behalf and "express[ed] no view as to whether [the subsidiary] may assert any Article VIII(1) rights of its parent." *Id.* at 189 n. 19, 102 S.Ct. at 2382 n. 19. UAC contends that it has standing to assert the Treaty defense of its parent.

We agree, following the lead of our sister circuit that has held that a subsidiary may assert the Treaty rights of the parent, "at least to the extent necessary to prevent the treaty from being set at naught." *Fortino v. Quasar Co.,* 950 F.2d 389, 393 (7th Cir.1991). As in *Fortino,* Uniden Japan rather than UAC made all the allegedly discriminatory decisions in the employment relationship with the expatriates.[1] The rationale of Fortino applies to this case:

---

[1] The expatriates were hired in Japan by the parent and were assigned by the parent to UAC. They all hold managerial positions, and their mission is to manage Uniden Japan's shareholder interests. They are subject to transfer at the request of Uniden Japan. Their salaries are set in Japan and Uniden Japan directs that UAC maintain a separate UAC payroll account for the expatriates; the parent sets their salaries, wages, benefits, hours and evaluates their job performance. 2 R. 298-302.

> A judgment that forbids [UAC] to give preferential treatment to the expatriate executives that its parent sends would have the same effect on the parent as it would have if it ran directly against the parent: it would prevent [Uniden Japan] from sending its own executives to manage [UAC] in preference to employing American citizens in these posts.

Fortino, 950 F.2d at 393.

Since UAC did not itself cause any of the discriminatory conduct, we hold that UAC may invoke its parent's Treaty rights, at least with respect to those employment decisions dictated by the parent. *Cf. id.* (distinguishing *Sumitomo* for the very reason that "there was no contention [in *Sumitomo*] that the parent had dictated the subsidiary's discriminatory conduct").[2]

IV. Conclusion

The domestic subsidiary may assert the Article VIII(1) Treaty rights on behalf of its Japanese parent

---

[2] Additionally, we note that all of the alleged favoritism was based on citizenship. *Fortino* recognized a difference between distinctions based on citizenship, which are permitted by the Treaty, and distinctions based on national origin, which Title VII prohibits. *Fortino*, 950 F.2d at 391-92. Like the subsidiary in *Fortino*, UAC employees of Japanese race and national origin who were not Japanese citizens were not shown favoritism. *Id.* at 393. Arguably, Title VII is not implicated. *See* 42 U.S.C.A. § 2000e-2(a)(1) (West 1994) (prohibiting employment discrimination based on race or national origin); *see also Fortino*, 950 F.2d at 393 (noting that favoring Japanese-American employees would have been "true national-origin discrimination since they are not citizens of Japan").

corporation. This Treaty right includes the right to favor Japanese citizens in placing executives to manage its shareholder interest. Plaintiff fails to demonstrate a genuine issue of material fact that would preclude a summary judgment in favor of UAC on Plaintiff's claims of Title VII discrimination. Plaintiff's request that this Court render a judgment for him is denied.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

THEODORE S. PAPAILA, Plaintiff,	§	
vs.	§	NO. 4:93-CV-336-A
UNIDEN AMERICA CORPORATION, Defendant.	§	

MEMORANDUM OPINION
and
ORDER

(Filed Jan. 10, 1994)

Came on to be considered in the above-styled and numbered action the motion of defendant, Uniden America Corporation, ("Uniden") for summary judgment. The court having considered the motion, the response of plaintiff, Theodore S. Papaila, ("Papaila") the summary judgment evidence, the record, and applicable authorities, has concluded that the motion should be granted in part, as set forth herein.

I.

Plaintiff's Complaint

Papaila makes the following allegations in his first amended complaint:

On May 3, 1988, he entered into a contract of employment with Uniden. Uniden breached the contract on April 1, 1992, by unilaterally reducing plaintiff's compensation plan, and by demoting him to the position of Vice President, International Sales, Mexico, Telektra Account. On January 3, 1993, Uniden again breached the contract by discharging him. Uniden engaged in a continuing pattern of discriminatory conduct against Papaila because of his age, forty-six, his race, white, and his national origin, American; and, Uniden discriminated against him in the terms, conditions and privileges of his employment and by demoting and discharging him.

Papaila asserts a cause of action pursuant to 42 U.S.C. § 2000e *et seq.* ("Title VII") based on the alleged race and national origin discrimination; and, he asserts a cause of action pursuant to 29 U.S.C. § 621 *et seq.* ("ADEA") based on the alleged age discrimination. He claims that Uniden has violated the Texas Commission on Human Rights Act of 1983 ("TCHRA"), Tex. Rev. Civ. Stat. Ann. art. 5221K, § 1.01 *et seq.* by discriminating against him on the basis of age, race, and national origin.

II.

The Motion for Summary Judgment and Plaintiff's Response

A. Uniden maintains that Papaila was an at-will employee and any alleged modification of such status through an employment contract is unenforceable by reason of the statute of frauds. To defeat the assertion that he was an at-will employee, Papaila relies on oral representations made to him by Yuzo (Nick) Noda ("Noda"), an

Executive Vice President of Uniden, and a letter he sent to Noda confirming those representations. He contends that his intent that the letter form a contract between him and Uniden, coupled with the handwritten notations and changes he says were made by Noda to the letter, constitute sufficient evidence to defeat Uniden's motion for summary judgment.

B. According to Uniden, the Friendship, Commerce and Navigation Treaty between the United States and Japan, Apr. 2, 1953, ("FCN Treaty") 4 U.S.T. 2063 allows it to exercise the rights of Uniden Corporation ("Uniden Japan"), its parent corporation, to favor citizens of Japan in matters relating to employment, and, therefore, it cannot be liable for discriminating against Papaila on the basis of his race and national origin. Papaila maintains that Uniden does not have standing to assert such treaty rights and that, even if it did, Title VII supersedes the FCN Treaty.

C. Further, Uniden contends that Papaila's demotion was made for legitimate business reasons. Papaila has failed to respond to that contention. Finally, Uniden contends that because, after his termination, Papaila's job responsibilities were assumed by Don Huffman ("Huffman"), who is nine years older than Papaila, Papaila is unable to prove a *prima facie* case of age discrimination. Papaila responds by arguing that the summary judgment evidence raises an issue of fact that his discharge was because of his age.

* * *

At the pretrial conference held in this action on January 4, 1994, the court made known its tentative views that

Uniden's motion for summary judgment has merit as to the claims discussed in A. and B. above. The court has concluded that the motion for summary judgment should be granted as to those grounds. The court is not prepared at this time to rule on the ground of Uniden's motion asserting entitlement to summary judgment as to Papaila's age discrimination claims. The rulings in this memorandum opinion and order are limited to the grounds of Uniden's motion that are described in A. and B. above.

III.

The Summary Judgment Evidence Pertinent to the Grounds of Uniden's Motion Dealt with by this Memorandum Opinion and Order

The summary judgment evidence of Uniden consists of (i) plaintiff's responses to interrogatories, (ii) a letter clarifying plaintiff's answer to interrogatory No. 34, (iii) a letter from Papaila to Noda accepting Uniden's offer of employment, (iv) a copy of the complaint filed by Papaila with the Texas Commission on Human Rights and the EEOC, (v) Papaila's affidavit in support of such complaint, (vi) Papaila's letter to Ms. Vivian Moore, an investigator with the EEOC, (vii) the affidavit of Kazunari Ikeda, Uniden's Director and Vice President, (viii) the affidavit of Katrina G. Desjardin, Uniden's Employment Manager, and (ix) excerpts from the oral depositions of Steven E. Fulford ("Fulford"), Corporate Vice President and General Manager of the Corporate Communication Division, and Susamo Ohashi ("Ohashi"), Managing Director of Uniden Japan and President of Uniden America Corporation. Papaila's summary judgment evidence

consists of excerpts from the oral depositions of (i) Robert J. Gibbs, Executive Vice President of Uniden, (ii) Thomas Carrello ("Carrello"), Vice President of Canadian Operations for Uniden, (iii) Papaila, (iv) Fulford, (v) Huffman, Vice President, International Sales, (vi) Ohashi, and (vii) Dr. Carl Swanson, an expert for Papaila. The summary judgment evidence shows without dispute that:[1]

Uniden is an Indiana Corporation and a subsidiary of Uniden Japan, which is a Japanese corporation with its headquarters in Tokyo, Japan. Uniden Japan is engaged in the business of manufacturing and selling a variety of electronic equipment.

Papaila is a white United States citizen of American national origin. On April 20, 1988, Uniden made an oral offer of employment to Papaila, which he accepted. The writing upon which Papaila bases his claim for breach of contract is a letter dated May 3, 1988, from Papaila to Noda. No one acting for Uniden signed this letter. Papaila testified by deposition that Noda orally agreed to the terms in the letter.

From June 1988 through March 1990 Papaila held the title of Vice President-Government Sector or of Vice President Market Development. From April 1990 through March 1992, Papaila held the position of Vice President Marketing for Uniden's Commercial Communication

---

[1] Many of these facts have also been stipulated to by the parties in their agreed "pretrial order" and during the pretrial conference held on January 4, 1994. The court has also considered as part of the summary judgment record admissions made by plaintiff in his complaint and in his response to Uniden's motion.

Division. During 1991 and 1992, Uniden Japan placed pressure on Uniden to eliminate employees who were not assigned individual quota or who were not meeting their quota. On April 1, 1992, Papaila was placed in the position of Vice President International Sales-Telektra. He reported directly to Huffman, and such position had an individualized quota and a lower salary. This is the demotion upon which Papaila bases – part of his claims.

On October 6, 1992, Fulford and Huffman sent a memo to Papaila stating that he had not made his quota in the first and second quarters of that year and inquired how he intended to meet his quota thereafter. In December 1992, it appeared that Papaila was not going to meet his third-quarter quota. In an attempt to assist Papaila to make his third-quarter quota, Fulford and Huffman went to Mexico to meet with Telektra representatives with the hopes of persuading them to buy additional products from Uniden. Papaila made approximately 85.2 percent of his quota for the third quarter. On January 3, 1993, Papaila was terminated. The reason given was that upper management had lost confidence in him.

Uniden has approximately 400 employees of which sixteen are on temporary work assignments sent to Uniden by Uniden Japan. Such employees are all Japanese citizens who have been sent by Uniden Japan in order to protect its interests in its subsidiary. The parties refer to such Japanese citizens as Japanese expatriates. Uniden does not dispute that such employees were treated differently than American employees, and the only basis for Papaila's claims of race and national origin discrimination is the preferential treatment given to Japanese expatriates. The Japanese expatriates were sent to Uniden

on temporary work assignments by Uniden Japan. The remainder of Uniden's employees, including six of Japanese origin, were under the direct control of Uniden. The six Uniden employees of Japanese origin were treated exactly the same as all of Uniden's employees and do not receive the same treatment as the Japanese expatriates.

IV.

Applicable Summary Judgment Principles

A party is entitled to summary judgment on all or any part of a claim as to which there is no genuine issue of material fact and as to which the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party has the initial burden of showing that there is no genuine issue of material fact. *Anderson*, 477 U.S. at 256. The movant may discharge this burden by showing an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has carried its burden under Rule 56(c), the non-moving party must do more than merely show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. *Anderson*, 477 U.S. at 248, 256. An issue is material only if its resolution could affect the outcome of the action. *Id.* at 248. Unsupported allegations, conclusory in nature, are insufficient

to defeat a proper motion for summary judgment. *Simmons v. Lyons*, 746 F.2d 265, 269 (5th Cir. 1984).

The Fifth Circuit explained the burden placed on the nonmovant:

> When the nonmovant fails to make a sufficient showing on an essential element of her case, the moving party is entitled to summary judgment "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

McKee v. City of Rockwall, Texas, 877 F.2d 409, 414-15 (5th Cir. 1989) (quoting *Celotex Corp.*, 477 U.S. at 323), *cert. denied*, 493 U.S. 1023 (1990).

V.

Analysis

A. Breach of Contract:

The general rule in Texas is that employment is terminable at will at any time by either party, with or without cause, absent an agreement to the contrary. *See Federal Express v. Dutchmann*, 846 S.W.2d 282 (1993); *Eastline & R.R.R. Co. v. Scott*, 72 Tex. 70, 10 S.W. 99, 102 (1888); *see also Benoit v. Polystar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App. – Beaumont 1987, writ ref'd n.r.e.). The parties may, either in writing or orally, modify the at-will employment status of an employee. *Goodyear Tire & Rubber Co. v. Portia*, 836 S.W.2d 664 (Tex. App. – Corpus Christi 1992); *Johnson v. Ford Motor Co.*, 690 S.W.2d 90 (Tex. App. – Eastland 1995, writ ref'd n.r.e.). However, if

the term of contracted employment is intended to exceed one year, the employment contract must be in writing. *See* Tex. Bus. & Comm. Code Ann. § 26.01(b)(6) (Vernon 1987); *Winograd v. Willis*, 789 S.W.2d 307, 310 (Tex. App – Houston [14th Dist.] 1990); *Bowser v. McDonalds Corp.*, 714 F. Supp. 839, 842 (S.D. Tex. 1989). When there is an agreement to retain an employee until he retires, and the retirement will not occur within one year, the statute of frauds requires a writing. *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991). The writing must be signed by the party to be charged, or by someone lawfully authorized to sign for him. Tex. Bus. & Comm. Code Ann § 26.01(a)(2) (Vernon 1987). *See also Hall v. Hall*, 158 Tex. 95, 308 S.W.2d 12 (1957).

Papaila asserts, in effect, that Uniden contracted with him to employ him until his retirement. At the time the alleged contract was made, Papaila was forty-two years old; and, the retirement age under Uniden's 401K plan was fifty-nine and one-half. Because he could not have retired within one year, any such contract must conform to the statute of frauds. *See* Tex. Bus. & Comm. Code Ann. § 26.01 (Vernon 1987). The letter upon which Papaila relies to meet the writing requirement was from him to Uniden. It was not signed by anyone on behalf of Uniden.[2] Therefore, there is no summary judgment evidence of an enforceable employment contract. *See* Tex. Bus. & Comm. Code Ann. § 26.01(a)(2). Papaila has also alleged that Uniden breached an employment contract with him

---

[2] Although there are some handwritten notations on the letter, there is no summary judgment evidence as to who made such notations or what they mean.

by demoting him on April 1, 1992. However, he has failed to produce any summary judgment evidence on, or even argue the terms of, any contract that would have been breached by the demotion. Such unsupported allegations, conclusory in nature, are insufficient to defeat Uniden's motion for summary judgment. *See Simmons*, 746 F.2d 265. Thus, the court has concluded that Uniden is entitled to summary judgment as to the breach of contract claims.

B. Discrimination Based on National Origin and Race:

Title VII provides that it shall be unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Uniden contends that, despite the prohibition in Title VII against discrimination based on race or national origin, article VIII(1) of the FCN Treaty entitles it to treat Japanese expatriates differently than American workers. Article VIII(1) of the FCN Treaty provides in pertinent part:

> [C]ompanies of either party shall be permitted to engage, within the territories of the other party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.

This article of the FCN Treaty applies only to companies of one of the treaty countries operating in the other country. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 182 (1982). In *Sumitomo Shoji* the Court held that local subsidiaries are considered for purposes of the FCN Treaty to be companies of the country in which they

are incorporated. *Sumitomo Shoji*, 457 U.S. at 188. Thus, a subsidiary incorporated in the United States is not directly covered by article VIII(1). *Id.* at 183. The Court, however, left open the question as to whether an American company may assert the article VIII(1) rights of its parent Japanese company. *Id.* at n.19.

The only reported court opinion that specifically addresses the issue as to whether a United States corporation can assert the article VIII(1) rights of its parent Japanese corporation is the Seventh Circuit's opinion in *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991). In *Fortino*, the court held that an American subsidiary of a Japanese parent company must be allowed to assert the article VIII(1) FCN Treaty rights of its parent. *Fortino*, 950 F.2d at 393. The court concluded that a judgment forbidding the American subsidiary from giving preferential treatment to the expatriate executives sent by its parent to work for the subsidiary would have the same effect on the parent as it would have if it ran directly against the parent – it would prevent the parent from sending its own executives to manage its American business in preference to employing United States citizens. *Id.* This court finds the Seventh Circuit's reasoning persuasive and concludes that Uniden must be allowed to assert the treaty rights of Uniden Japan in order to "prevent the treaty from being said at naught." *Id.* Having determined that Uniden must be allowed to assert the treaty rights of Uniden Japan, the court must now determine what those rights are.

The "of their choice" language in article VIII(1) does not mean that a Japanese company has a blanket authority to discriminate against individuals based on their

race, color, religion, sex, or national origin as such discrimination would clearly be in violation of Title VII. The FCN Treaty language does, however, mean that "[c]ompanies have a right to decide which executives and technicians will manage their investment in the host country, without regard to host country laws."[3] *Spiess v. Itoh & Co., Inc.*, 643 F.2d 353, 361 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982); *see also Fortino*, 950 F.2d at 389; *Macnamara v. Korean Air Lines*, 863 F.2d 1135 (3rd Cir. 1988).

Article VIII(1) exempts the entity asserting such rights "from domestic employment discrimination laws to the extent of permitting discrimination in favor of Japanese citizens in employment for executive and technical positions." *Spiess*, 643 F.2d at 359.[4]

In this case Uniden Japan exercised its rights under the FCN Treaty to choose citizens of its own nation, because they are such citizens, to operate its business in the United States. "This was favoritism all right, but discrimination in favor of foreign executives given a special status by virtue of a treaty and its implementing regulations is not equivalent to discrimination on the

---

[3] Papaila argues that there is a conflict between the treaty and Title VII and that Title VII should prevail because it was enacted after the treaty was signed. "Only when Congress clearly intends to depart from the obligations of a treaty will inconsistent federal legislation govern." *Spiess*, 643 F.2d at 356. There is no such intent in Title VII. *See id.*

[4] Because the Supreme Court vacated and remanded the case on other grounds, the Fifth Circuit's ruling on this issue remains valid, controlling law. *See Adams v. Mitsubishi Bank Ltd.*, 751 F. Supp. 1548 n.8. (E.D. N.Y. 1990).

basis of national origin." *Fortino*, 950 F.2d at 392; *see Spiess*, 643 F.2d at 389. Papaila has failed to adduce summary judgment evidence that any of Uniden's employees of Japanese origin, but not Japanese citizens, were in any way favored by Uniden. To the contrary, the summary judgment evidence shows that such employees were treated the same as all other Uniden employees of non-Japanese citizenship. *See Fortino*, 950 F.2d at 389.

The court concludes that Uniden is entitled to assert the FCN Treaty rights of its parent corporation and that such treaty rights include the right to discriminate in favor of Japanese citizens. Therefore, Uniden is entitled to summary judgment as to Papaila's claim of discrimination in violation of Title VII.

Treaties such as the FCN Treaty are "the supreme law of the land," and supersede inconsistent state law. U.S. Constitution art. 6, cl. II; *United States v. Pink*, 315 U.S. 203, 230 (1942); *DeTenorio v. McGowan*, 510 F.2d 92, 95 (5th Cir. 1975). The court concludes, therefore, that Uniden is entitled to summary judgment on Papaila's claim of discrimination on the basis of race and national origin brought pursuant to the TCHRA.

VI.
Order

For the reasons discussed herein, the court ORDERS that the motion of Uniden for summary judgment be, and is hereby, granted as to Papaila's claims for breach of contract and discrimination on the basis of race and national origin.

The court has under advisement the ground of Uniden's motion for summary judgment pertaining to Papaila's age discrimination claim.

SIGNED January 10, 1994.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

THEODORE S. PAPAILA, Plaintiff,	§	NO. 4:93-CV-336-A
VS.	§	
UNIDEN AMERICA CORPORATION, Defendant.	§	

ORDER

(Filed Jan. 27, 1994)

Came on to be considered in the above-styled and numbered action the motion of plaintiff, Theodore S. Papaila, ("Papaila") for reconsideration of order granting partial summary judgment. All the points presented by Papaila in his motion for reconsideration have already been considered by the court in granting partial summary judgment. Therefore,

The court ORDERS that Papaila's motion for reconsideration of order granting partial summary judgment be, and is hereby, denied.

SIGNED January 27, 1994.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

THEODORE S. PAPAILA, Plaintiff,	§	NO. 4:93-CV-336-A
VS.	§	
UNIDEN AMERICA CORPORATION, Defendant.	§	

FINAL JUDGMENT AS TO ALL CLAIMS

(Filed Jan. 28, 1994)

Consistent with the memorandum opinion and order signed by the court January 10, 1994, by which the summary judgment of defendant, Uniden America Corporation, as to the claims of plaintiff, Theodore S. Papaila, for breach of contract and discrimination on the basis of race and national origin were granted and the final judgment of dismissal with prejudice signed by the court January 27, 1994, by which, pursuant to a settlement agreement of the parties, plaintiff's causes of action for age discrimination and breach of contract were dismissed with prejudice,

The court ORDERS, ADJUDGES and DECREES that all claims and causes of action asserted by plaintiff against defendant be, and are hereby, dismissed.

SIGNED January 28, 1994.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

(2)

Supreme Court, U.S.
FILED
AUG 30 1995
CLERK

No. 95-171

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THEODORE S. PAPAILA,
Petitioner,

v.

UNIDEN AMERICA CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

RICHARD M. KOBDISH *
REBECCA A. SINGER
R. S. GHIO
FULBRIGHT & JAWORSKI L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201
(214) 855-8000
Counsel for Respondent
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

36 pp

QUESTIONS PRESENTED

1. May Respondent, an American subsidiary of a Japanese corporation, invoke the rights of its Japanese parent corporation under the 1953 Treaty of Friendship, Commerce and Navigation between the United State and Japan ("FCN Treaty") with respect to the parent corporation's placement of, and personnel decisions regarding, Japanese nationals ("expatriates") sent to the subsidiary to manage the parents' assets invested in the United States?

2. Notwithstanding the FCN Treaty, may a United States citizen who is an employee of such a subsidiary assert an action under Title VII of the Civil Rights Act of 1964 alleging discriminatory conduct in the placement and treatment of Japanese expatriates sent to the United States by the Japanese parent corporation to manage its investments in this country?

3. Is there any conflict among the Circuit Courts of Appeals with respect to the Fifth Circuit's decision below that the FCN Treaty acts as a limited bar to certain actions under Title VII?

4. Is the decision of the Fifth Circuit below consistent with this Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982)?

PARTIES TO THE PROCEEDINGS

Respondent, Uniden America Corporation (a wholly-owned subsidiary of Uniden Corporation), and Petitioner, Theodore S. Papaila ("Papaila").

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
A. The Business of Uniden America	2
B. Uniden America's Workforce	3
C. The Japanese Expatriates	4
D. Uniden America's Other Employees	5
E. Proceedings Below	6
SUMMARY OF REASONS FOR DENYING THE WRIT	7
REASONS FOR DENYING THE WRIT	9
I. THE TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION GRANTS JAPANESE CORPORATIONS THE RIGHT TO ASSIGN KEY PERSONNEL OF THEIR CHOICE TO THEIR U.S. OPERATIONS	9
II. THE SUPREME COURT'S DECISION IN *SUMITOMO SHOJI* LEFT OPEN THE QUESTION OF WHETHER A SUBSIDIARY OF A FOREIGN CORPORATION MAY ASSERT CERTAIN TREATY RIGHTS OF ITS PARENT	11
III. UNIDEN AMERICA MAY ASSERT CERTAIN TREATY RIGHTS OF ITS JAPANESE PARENT	13

TABLE OF CONTENTS—Continued

Page

A. The Fifth Circuit's Decision Is Limited to Personnel Decisions Dictated by the Parent Corporation 14

B. Uniden America Has Standing to Assert Its Parent's Treaty Rights Because the Rights of the Parent Corporation Otherwise Will Be Impaired 14

1. The Fifth Circuit's Decision That Uniden America May Assert the Treaty Rights of Its Japanese Parent Is Consistent With the Relevant Case Law 16

a. The Fifth Circuit's Decision Closely Adheres to the Seventh Circuit's Decision in *Fortino* 16

b. The District Courts' Rulings in *Spiess* and *Goyette* Do Not Mandate a Different Result 19

2. The Fifth Circuit's Decision Is Consistent With the Language of the Treaty 20

3. The Fifth Circuit's Decision Is Not in Conflict With Decisions of Other Courts.. 22

IV. TITLE VII AND THE FCN TREATY MAY BE READ IN HARMONY BY EXCLUDING JAPANESE EXPATRIATES AS COMPARITORS UNDER TITLE VII 24

A. Papaila Acknowledges That the Treaty Grants Immunity From Title VII Under Certain Circumstances 24

B. Papaila's "Harmonizing" of Title VII With the FCN Treaty Would Frustrate the Purpose of the Treaty 25

C. Papaila's "Harmonizing" of Title VII and the FCN Treaty Is Unsupported by the Case Law 25

TABLE OF CONTENTS—Continued

Page

D. The FCN Treaty and Title VII May Be Read in Harmony by Excluding as Comparitors Under Title VII Expatriates Who Are Under the Control of the Parent 27

E. The Decision Below Reflects Good Public Policy 28

CONCLUSION 29

TABLE OF AUTHORITIES

CASES — Page

Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d 552 (2nd Cir. 1981) 9, 21, 23
Blanco v. United States, 775 F.2d 53 (2nd Cir. 1985) 24
Castaneda v. Partida, 403 U.S. 482, 97 S.Ct. 1272 (1977) 17
Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 S.Ct. 334 (1973) 17
Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991) 6, 12, 15, 17-19, 24
Goyette v. DCA Advertising, 66 Fair Empl. Prac. Cas. (BNA) 1045 (S.D.N.Y. 1993) 20
MacNamara v. Korean Air Lines, 863 F.2d 1135 (3rd Cir. 1988), *cert. denied*, 493 U.S. 944 (1989) 27
Papaila v. Uniden America Corp., 51 F.3d 54 (5th Cir. 1995) 6, 7, 12, 24, 27-28
Papaila v. Uniden America Corp., 840 F.Supp. 440 (N.D. Tex. 1994) 6
Posados v. National City Bank, 296 U.S. 497, 56 S.Ct. 349 (1936) 24
Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364 (1991) 15
Spiess v. C. Itoh & Co. (America), Inc., 643 F.2d 353 (5th Cir. 1981) 26
Spiess v. C. Itoh & Co., Inc., 725 F.2d 970 (5th Cir. 1984), *cert. denied*, 469 U.S. 829 (1984) 19-20
Starrett v. Iberia Airlines of Spain, 756 F.Supp. 292 (S.D.Tex. 1989) 19
Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 102 S.Ct. 2374 (1982) ... 9, 10-12, 18, 20, 22, 29
Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984) 10

STATUTES

1953 Treaty of Friendship, Commerce, and Navigation, 4 U.S.T. 2063 ..... 1, 2, 8-10
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-171

THEODORE S. PAPAILA,

Petitioner,

v.

UNIDEN AMERICA CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS

Article VII(1) of the Treaty of Friendship, Commerce, and Navigation between the United States and Japan, April 2, 1953 (hereinafter "FCN Treaty" or "the Treaty"), provides, in relevant part:

> Nationals and companies of either Party . . . shall be permitted within [the] territories [of the other Party]: (a) to establish and maintain branches, agencies, offices, factories, and other establishments appropriate to their conduct of business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired.

4 U.S.T. 2063, art. VII(1).

Article VIII(1) of the FCN Treaty further provides in relevant part:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice.*

4 U.S.T. 2063, art. VIII(1) (emphasis added).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, provides that it is unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2.

STATEMENT OF THE CASE

A. The Business of Uniden America

Uniden America is incorporated in the State of Indiana, and has its offices and principal place of business located in Tarrant County, Texas. Uniden Corporation ("Uniden Japan"), the parent of Uniden America, has its headquarters in Tokyo, Japan. Uniden Japan is engaged in the business of designing, manufacturing and selling a variety of electronic equipment including radio communication devices ("C.B." transceivers, etc.), radio applications (*i.e.*, pagers, radar detectors, two-way radios, and

scanners), telephone equipment (cordless, mobile, cellular and portable telephones), and satellite broadcast receiving equipment. Uniden Japan's primary manufacturing facilities are located at subsidiaries in the Philippines and in China. Uniden Japan has approximately 9,000 employees world-wide and, in addition to Uniden America, has many other subsidiaries located in various countries throughout the world. Vol. II at 298-99; Vol. IV at 782.[1]

B. Uniden America's Workforce

As found by the District Court, and undisputed by Papaila:

> Uniden [America] has approximately 400 employees of which sixteen are on temporary work assignments sent to Uniden [America] by Uniden Japan. Such [temporary] employees are all Japanese citizens who have been sent by Uniden Japan in order to protect its interests in its subsidiary. The parties refer to such Japanese citizens as Japanese expatriates. Uniden [America] does not dispute that such employees were treated differently than American employees, and the only basis for Papaila's claims of race and national origin discrimination is the preferential treatment given to Japanese expatriates. The Japanese expatriates were sent to Uniden [America] on temporary work assignments by Uniden Japan. The remainder of Uniden [America's] employees, including six of Japanese origin, were under the direct control of Uniden [America]. The six Uniden [America] employees of Japanese origin were treated exactly the same as all of Uniden [America's] employees and [they] do not receive the same treatment as the Japanese expatriates.

Vol. IV at 783-84. Thus, less than five percent of the employees working at Uniden America's Texas headquarters are Japanese expatriates, whom Papaila alleges re-

[1] Citations to the original record on appeal shall first refer to the volume, and then to the page or pages in that volume.

ceived preferential treatment on the basis of race and national origin. Stated differently, almost ninety-six percent (96%) of Uniden America's workforce consists of persons, *including* six employees of Japanese "race" and national origin, who were treated no more favorably than Papaila in connection with the issues raised by the Petition for Writ of Certiorari ("Petition").

C. The Japanese Expatriates

Papaila previously has admitted that the Japanese expatriates whom he alleges enjoyed more favorable treatment all occupy (or occupied) managerial positions, all were hired in Japan by Uniden Japan, and all were assigned by the parent to Uniden America. Papaila's Brief to the Fifth Circuit ("Papaila's Brief") at 5. Moreover, prior to the beginning of their temporary overseas assignments, all Japanese expatriates received extensive business training from the parent company. The mission of these Japanese expatriates, regardless of the Uniden Japan subsidiary or the country to which they are assigned, is to manage Uniden Japan's shareholder interests and to provide skills essential to the business of the subsidiary. Vol. II at 298-301. Papaila repeatedly has admitted that all of the personnel actions or policies which he alleges discriminated in favor of the Japanese expatriates, and against him as well as all other employees of Uniden America who were not Japanese expatriates, were established or committed by the parent company, Uniden Japan, and *not* by Uniden America.[2]

---

[2] Several times in his Petition, Papaila vacillates from alleging that Uniden America discriminated in favor of its "Japanese employees," to stating that the "Japanese expatriates" were the beneficiaries of favored treatment. *Compare, e.g.*, Petition at 3, 19 with 5, 18. Of course, there is a highly significant difference between these two groups. Papaila's persistent inconsistency is inexplicable, because at no time in this proceeding has he alleged that the six Uniden America employees who are of Japanese race and national origin, but who are not expatriates, were treated better than he. Clearly, then, the list of persons Papaila contends were the victims

The salaries of Uniden America's Japanese expatriates are carried on a separate Uniden America payroll account. Uniden Japan makes all personnel-related decisions involving Japanese expatriates. Furthermore, Uniden Japan hires, fires, transfers, promotes, and discharges the Japanese expatriates assigned to Uniden America. Such assignments are temporary, typically from four to five years, at the end of which the Japanese expatriate is brought back to the parent in Japan or assigned to another foreign subsidiary. Uniden Japan alone evaluates the performance of the Japanese expatriates. It also unilaterally sets their salary and benefit structure (which is different from the salary and benefit structure of other Uniden America employees), and maintains their personnel files. Vol. II at 300-01; Vol. III at 708-09, 714, 716, 718, 720, 723-24.

D. Uniden America's Other Employees

In contrast to the Japanese expatriates, all other Uniden America employees are under the direction and control of Uniden America, and their wages, benefits, etc. are set by Uniden America management. Significantly, this *includes* six employees of Uniden America who, although of Japanese "race" and national origin, were hired by Uniden America in the United States, just like all other U.S. employees. As stated above, these six people of Japanese "race" and national origin are treated *exactly* the same as all of Uniden America's *non*-Japanese citizen employees. Vol. II at 300, 302; Vol. III at 716, 720.[3]

---

of race and national origin "discrimination" includes the six Uniden America employees of Japanese "race" and national origin, who happen not to be expatriates. Papaila's Brief at 4-6; Vol. III at 677-78; *see also* Vol. II at 302-03.

[3] Papaila incorrectly asserts that Uniden America has "at no time below . . . raise[d] citizenship as the distinction in the treatment of its expatriate employees." Petition at 6. Papaila made

E. Proceedings Below

Papaila's characterization of the decisions of the courts below is imaginative, but inaccurate. On May 19, 1993, Papaila filed this lawsuit in the Northern District of Texas, alleging various types of discrimination including, *inter alia*, the Title VII claims he continues to pursue herein. On December 3, 1993, Uniden America moved for partial summary judgment, and on January 10, 1994, the District Court granted said motion.

Contrary to the representations made by Papaila, the District Court did *not* hold that Uniden America was "entitled to assert all treaty rights of its parent corporation." Petition at 3. Rather, the District Court concluded, consistent with the decision in *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991), only that:

> [A] judgment forbidding the American subsidiary from giving preferential treatment to the expatriate executives sent by its parent to work for the subsidiary would have the same effect on the parent as it would have if it ran directly against the parent—it would prevent the parent from sending its own executives to manage its American business in preference to employing United States citizens.

Papaila, 840 F. Supp. at 446. The question of whether the subsidiary was entitled to assert *all* of the treaty

---

this same argument to the Fifth Circuit, and Uniden America pointed out there, as here, that the assertion was "absolutely incredible." As explained to the Fifth Circuit, Uniden America raised the issue of citizenship *three* times in its Motion for Summary Judgment, *six* times in its Brief in Support thereof, *twice* in the Pretrial Order, and at least once in the hearing on Uniden America's Motion for Summary Judgment. Uniden America's Brief to the Fifth Circuit ("Uniden's Brief") at 6 n.7. Thus, Uniden has raised the citizenship distinction as a central issue both before the District Court as well as the Fifth Circuit, as evidenced by the fact that both courts discussed citizenship in reaching their decisions. *Papaila v. Uniden America Corp.*, 51 F.3d 54, 56 n.2 (5th Cir. 1995); *Papaila v. Uniden America Corp.*, 840 F. Supp. 440, 447 (N.D. Tex. 1994).

rights was not before the District Court; rather, the only issue was whether the treaty provisions would protect the subsidiary from Title VII liability where decisions, such as the placement and treatment of key managerial personnel, are dictated by the parent company.

As discussed more fully herein, the Fifth Circuit decision also is much narrower than suggested by Papaila. The Fifth Circuit expressly limited its holding to the specific facts before it:

> Since UAC [Uniden America] did not itself cause any of the discriminatory conduct, we hold that UAC may invoke its parent's Treaty rights, at least *with respect to those employment decisions dictated by the parent.*

Papaila, 51 F.3d at 56 (emphasis added). Thus, both courts below held only that Uniden America could assert the treaty rights of its Japanese parent with respect to personnel decisions dictated by the parent which involve its expatriate personnel. As a result, Papaila's foreboding statements regarding the breadth of the Fifth Circuit decision are unfounded.

SUMMARY OF REASONS FOR DENYING THE WRIT

In order to construct an argument that the decision of the Fifth Circuit merits review by this Court, which it does not, Papaila makes two fundamental errors. First, he entirely mischaracterizes the nature and scope of the decision of the court below. Second, based upon this unduly expansive reading of the decision of the court below, Papaila creates out of whole cloth a supposed "conflict" among the Circuit Courts of Appeals where none in fact exists. When the decisions of the Fifth Circuit and the other Circuit Courts are read in accordance with their plain language, it becomes abundantly clear that a writ of *certiorari* is unnecessary.

Papaila, "a white United States citizen of American national origin" (Vol. IV at 782), essentially asserts in this

case that he was the victim of "reverse" race and national origin discrimination. That is, Papaila claims that had he been a Japanese expatriate, he would not have been fired for failing to "make" his sales quota,[4] but instead would have been given a demotion or transfer, as Japanese expatriates allegedly were. *See* Papaila's Brief at 5-6. Uniden America contends, and the Fifth Circuit agreed, that the District Court was correct in granting summary judgment on these issues because the "discrimination" of which Papaila complains, even if true, expressly is *allowed* by the FCN Treaty between the United States and Japan, which confers narrow Title VII immunity for *this* type of discrimination. Indeed, as demonstrated *infra*, where the individuals allegedly receiving preferential treatment are "accountants and other technical experts, executive personnel, attorneys, agents and other specialists" (4 U.S.T. 2063, art. VIII(1)), are citizens of the country in which the foreign parent is headquartered, and are sent to the United States on a temporary expatriate basis, a non-expatriate employee of the United States subsidiary (like Papaila) cannot point to those expatriates as "comparitors" for purposes of race and national origin discrimination.

The Fifth Circuit decision upholding Uniden America's arguments is correct and need not be reviewed by this Court. First, the decision below is much narrower than is suggested by Papaila. Rather than granting Uniden America complete immunity in all respects from Title VII, the Fifth Circuit held only that insofar as Uniden America's employment actions relating to executives and other key expatriate personnel are *directed* by the parent corporation, such decisions are protected under the provisions of the FCN Treaty and therefore do not violate Title VII. With respect to all other employment decisions relating to non-expatriate employees, Uniden America

---

[4] At the time of his termination, Papaila was in a sales position, after having been demoted from the position of Vice President. Petition at 4.

still is bound by the employment laws of the United States, including Title VII.

As a result, Papaila's argument regarding a "conflict" among the Circuit Courts of Appeals fails. Papaila apparently attempts to create a conflict by pointing to the Second Circuit's ruling in *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2nd Cir. 1981) *rev'd and remanded*, 457 U.S. 176 (1982), that the FCN Treaty does not grant American subsidiaries of Japanese corporations *complete* immunity from Title VII. However, such a ruling neither has been sought by Uniden America nor granted by the Fifth Circuit. Furthermore, the Second Circuit's decision does not conflict with that of the Fifth Circuit regarding the assertion of treaty rights by a subsidiary. Because the Fifth Circuit and Second Circuit decisions are not in conflict, a writ of *certiorari* would be inappropriate.

REASONS FOR DENYING THE WRIT

I. THE TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION GRANTS JAPANESE CORPORATIONS THE RIGHT TO ASSIGN KEY PERSONNEL OF THEIR CHOICE TO THEIR U.S. OPERATIONS

Under the FCN Treaty between the United States and Japan, companies of each country have the right to form and oversee their investments made within the territory of the treaty partner, either directly through branch offices or indirectly under the general corporate laws of the other party. 4 U.S.T. 2063, art. VII(1). Pursuant to this provision, Uniden Japan formed Uniden America. To ensure that companies of each party to the FCN Treaty are able to protect their investments in the territory of the other party, the FCN Treaty further provides that companies of each party have the right to assign certain key personnel to their operations in the host country. Thus, Article VIII(1) of the FCN Treaty provides in relevant part:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice*.

4. U.S.T. 2063, art. VIII(1) (emphasis added).

Consequently, the FCN Treaty allows a company headquartered in the territory of one party to favor its own citizens in filling management positions within the host country, without running afoul of local laws such as Title VII's prohibition against national origin and race discrimination. As the Sixth Circuit found with respect to a similar treaty between the United States and Greece:

> [C]ompanies of either party are permitted to discriminate in favor of their own nationals or citizens for certain high level positions, but not to discriminate against others in the labor force of the host country on any other basis. The words "of their choice" merely reflect the intent of both the United States and Greece to give the other's companies the freedom to fill designated critical positions *without* interference of local laws and regulations.

Wickes v. Olympic Airways, 745 F.2d 363, 367 (6th Cir. 1984) (emphasis added).[5] Thus, the holding in *Wickes*,[6] like that of every other Circuit Court of Appeals

---

[5] This reciprocal treaty provision which allows the placement of a treaty country's citizens in executive positions appears in a number of FCN treaties between the United States and foreign countries. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 181 n.6, 102 S.Ct. 2374, 2377 n.6 (1982). As this Court expressly has recognized, the reciprocal provision in the Treaty between the United States and Japan was included at the insistence of the United States, which sought to protect its interests in making certain that American companies could assign American citizens to executive positions in their overseas operations without violating foreign laws. *Id.*

[6] Although in *Wickes* the employer charged with discrimination was a Greek corporation, not a subsidiary organized and existing

which has addressed the issue of the *scope* of protection granted by the Treaty, fully supports the decision of the Fifth Circuit.[7]

Importantly, Papaila cites *no authority* to the contrary. Instead, he ignores all of the case law on this issue and cites law review articles four decades old for the general proposition that the FCN Treaty was not intended to act as an exception to Title VII. Significantly, however, the federal courts consistently have recognized that the Treaty *does* create such an exception. What Papaila requests of this Court is that it reverse decades of Circuit Court precedent and radically re-interpret the scope of the Treaty. This is an invitation the Court should decline.

II. THE SUPREME COURT'S DECISION IN *SUMITOMO SHOJI* LEFT OPEN THE QUESTION OF WHETHER A SUBSIDIARY OF A FOREIGN CORPORATION MAY ASSERT CERTAIN TREATY RIGHTS OF ITS PARENT

In *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 102 S. Ct. 2374 (1982), the U.S. Supreme Court held that, since Sumitomo was incorporated under the laws of the United States, it was not a "company of Japan," and therefore *it* did not have treaty rights under article VIII(1) of the FCN Treaty. 457 U.S. at 189.

---

under the laws of the United States, the case does demonstrate (as do other cases cited *infra*) that when an FCN treaty applies to a case alleging violation of United States employment discrimination laws, the treaty does create some degree of immunity under Title VII with respect to a very narrow category of employees (*i.e.*, foreign citizen expatriates in job classifications covered by the treaty).

[7] Papaila argues in his Petition that while it legally is permissible for an expatriate from a foreign country to be *assigned* a position in the United States in preference to U.S. nationals (which, without treaty protection, would be a *per se* violation of Title VII), once here, the expatriate thereafter can in no way receive "favored" treatment. As is demonstrated below, such a distinction cannot withstand scrutiny, either legally or practically.

However, since the Court confined its review to the narrow question of whether the American subsidiary could assert treaty rights on its own behalf as a "company of Japan," the Supreme Court added the following caveat:

> We also express no view as whether Sumitomo may assert any article VIII(1) rights of its parent.

457 U.S. at 189 n.19, 102 S. Ct. at 2382 n.19.

Thus, since Uniden America is incorporated under the laws of Indiana, it cannot *itself* claim a right under the FCN Treaty to assign Japanese citizens to executive and managerial positions at Uniden America. Here, however, unlike in *Sumitomo Shoji*, Uniden America seeks to assert the treaty rights of its *parent* with respect to the *parent's* decisions to assign expatriates to Uniden America, and to maintain them there, on the basis of their Japanese citizenship.

Interestingly, Papaila argues in his Petition that the Fifth Circuit decision below is in conflict with this Court's decision in *Sumitomo Shoji*, because it would grant U.S. subsidiaries "absolute standing" under the FCN Treaty. Petition at 8. As shall be demonstrated herein, Papaila is incorrect. The Fifth Circuit did *not* rule, and Uniden America never has contended, that Uniden America could assert *all* of the treaty rights of its Japanese parent. Rather, the court below simply ruled that a U.S. subsidiary "may assert the Treaty rights of the parent, 'at least *to the extent necessary to prevent the treaty from being set at naught.*'" *Papaila*, 51 F.3d at 55 (emphasis added) (quoting *Fortino*, 940 F.2d at 393). The court further held that in order to fulfill the purpose of the Treaty, a subsidiary should be able to invoke its parent's rights "with respect to those employment decisions dictated by the parent." *Id.* at 56. The court below went *no further*.

Thus, with respect to the sixteen expatriate employees whose assignment and terms of employment are

dictated by the parent corporation, Uniden America may assert the treaty rights of Uniden Japan. However, with respect to the balance (96%) of Uniden America's workforce, the U.S. subsidiary must fully comply with U.S. and local laws, including Title VII. This is a fundamentally different result from that proscribed by the Supreme Court in *Sumitomo Shoji*, and thus there is no conflict between the two decisions.

III. UNIDEN AMERICA MAY ASSERT CERTAIN TREATY RIGHTS OF ITS JAPANESE PARENT

As stated above, the facts in this case show, and Papaila concedes, that *none* of the conduct or policies which allegedly discriminate on the basis of race or national origin were the creation of Uniden America. Rather, *all* were dictated by the parent company, Uniden Japan. Uniden America had no say whatsoever in these policies or personnel decisions. Furthermore, it is undisputed that each of the Japanese expatriates sent to Uniden America by the parent were Japanese citizens and were "accountants and other technical experts, executive personnel, attorneys, agents and other specialists." Uniden Japan, whose standing under the FCN Treaty is unchallenged, chose to send these individuals to the United States in order to oversee and protect its investment assets. Papaila contends that these individuals were given preferential treatment, as compared to him.

These contentions and undisputed facts bring into sharp focus the issue that was *not* reached in *Sumitomo Shoji*, *i.e.*, whether a United States subsidiary which is not a "company of Japan," can assert certain treaty rights of a parent which *is* such a company. Uniden America contends that since *it* was not the agent of causation for any of the alleged discriminatory events or policies, Uniden America *must* be able to invoke the FCN Treaty rights of its parent—at least with respect to those employment-related matters over which *Uniden America*

had no control—or else the FCN Treaty would have no meaning in the modern business world.

A. The Fifth Circuit's Decision Is Limited to Personnel Decisions Dictated by the Parent Corporation

In a fundamental misstatement of the holding of the court below, Papaila argues in his Petition that Uniden America "does not have standing to assert [the FCN Treaty] as an *absolute* bar to Title VII." Petition at 8 (emphasis added).[8] However, this was not the decision of the Fifth Circuit, which expressly *limited* its holding to personnel decisions mandated by the parent corporation regarding expatriate employees. This *limited* holding is ignored by Papaila, who instead attacks his own rhetoric.

B. Uniden America Has Standing to Assert Its Parent's Treaty Rights Because the Rights of the Parent Corporation Otherwise Will Be Impaired

Papaila argues in his Petition that Uniden America lacks standing to assert the rights of its parent because: (a) a litigant should not be allowed "to base a claim or a defense on the rights of a person not before the Court;" and (b) "there has been no impairment of rights" of Uniden Japan. Petition at 9. Neither of these arguments is correct.

---

[8] Papaila makes similarly broad and inaccurate statements throughout his Petition regarding the holding of the court below. Papaila mistakenly accuses the Fifth Circuit of holding that Uniden America: "is entitled to assert *all* treaty rights of its parent corporation;" can assert the FCN Treaty as "an *absolute bar* to the laws of the United States;" has "*absolute standing* . . . to assert *all* of the rights of [Uniden Japan];" and may "*wholly ignore* American statutes, including Title VII." Petition at 3, 7, 8, 16 (emphasis added). At one point Papaila even argues that the Fifth Circuit "endorsed a right to *assign treaty rights* of a Japanese parent company to its wholly owned subsidiary" and that Uniden Japan should not be given an "unfettered right to order an American corporation to violate American laws." *Id.* at 10, 22 (emphasis added). Unfortunately for Papaila, there is nothing in the Fifth Circuit's decision to support his hyperbole.

First, Papaila's argument ignores *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364 (1991), which set out three factors a litigant must meet in order to assert the rights of third persons, each of which is met in this case: (1) the litigant must face an "injury-in-fact" giving it a "sufficiently concrete interest" in the issue (here, an adverse verdict would subject Uniden America to the payment of damages for the disputed policies or decisions of its parent); (2) the party must have a close relationship to the third person (Uniden America is a subsidiary of Uniden Japan); and (3) some hindrance must exist to the third party's ability to protect its own interests (Uniden America, not Uniden Japan, carries out the business functions at the Tarrant County, Texas headquarters). *Id.* at 410-11, 111 S.Ct. at 1370-71. As the Seventh Circuit held in *Fortino*, where, as here, the parent dictates the alleged discriminatory conduct, the subsidiary *must* be allowed to assert the FCN Treaty rights of the parent. Otherwise, the FCN Treaty would be "set at naught." 950 F.2d at 393.

Second, there undoubtedly would be an impairment of the rights of Uniden Japan if the Fifth Circuit's decision were reversed. Each of the decisions challenged by Papaila herein was made by *Uniden Japan* for the purpose of managing expatriate employees sent to the United States to oversee its investments. Papaila urges a reading of Title VII and the FCN Treaty which would tie the hands of Uniden Japan with respect to personnel decisions regarding the executives, etc. *of its choice* whom it desires to send to this country. Clearly, the impairment of Uniden Japan's treaty rights imposed by such a result would be no less onerous than an adverse holding against Uniden Japan itself.

The only argument put forward by Papaila to the contrary is that Uniden Japan, "*when [itself] involved in litigation*, [is] perfectly capable of enforcing [its] own statutory treaty rights." Petition at 10 (emphasis added).

This adds nothing to the Court's inquiry. As is obvious by the caption of this case, Uniden Japan is *not*, itself, "involved" in this litigation, although it certainly has an interest in the outcome. What Papaila suggests is that a Japanese company can be stripped of its rights under the FCN Treaty, just so long as a plaintiff sues its subsidiary. Such a result is antithetical to the FCN Treaty and should be rejected. Where employment decisions are dictated by an entity that is protected under the Treaty, such protection should not dissolve merely because the entity acts through its U.S. subsidiary.

1. *The Fifth Circuit's Decision That Uniden America May Assert the Treaty Rights of Its Japanese Parent Is Consistent With the Relevant Case Law*

Papaila attempts to discredit the substance of the Fifth Circuit's decision by arguing that other case law forecloses the Fifth Circuit's holding. However, the decision below is consistent with the reasoning of other circuits, and the District Court cases cited by Papaila do not dictate the result he advocates.

a. *The Fifth Circuit's Decision Closely Adheres to the Seventh Circuit's Decision in* Fortino

Although Papaila previously has attempted to discredit the recent Seventh Circuit Court of Appeals' decision in *Fortino,* his Petition hardly mentions the decision at all, and never critiques its analysis in any depth. This reticence is surprising because the Seventh Circuit clearly *rejected* all of Papaila's arguments and embraced those of Uniden America. Thus, in *Fortino,* as here, the United States subsidiary of a Japanese parent did not assert that the FCN Treaty gave it blanket immunity from *all* types of discrimination and at all levels of the organization. Rather, the position of the employer (Quasar), like that of Uniden America, was that:

> The treaty permits discrimination on the basis of citizenship, not of national origin; Title VII forbids discrimination on the basis of national origin, not of citizenship.[9] The treaty is a reminder that the two forms of discrimination—citizenship and national origin—must not run together, since one is permitted by treaty and the other forbidden by statute.

Fortino, 940 F.2d at 391-92.[10]

As in the instant case, in *Fortino* the Japanese parent sent a relatively small number of expatriates to the United States in order to oversee its investments. Moreover, the Japanese parent caused all of the conduct which was alleged to be discriminatory. This included the assignment of Japanese expatriates to other subsidiaries, or back to Japan, instead of discharging them as the United States subsidiary had done with respect to the plaintiffs. *Id.* at 392. The *Fortino* court stated:

> This was favoritism all right, but discrimination in favor of foreign executives given a special status by virtue of a treaty and its implementing regulations is not equivalent to discrimination on the basis of national origin [or race].

Id. The court went on to find:

---

[9] *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 S.Ct. 334 (1973).

[10] Before the Fifth Circuit, Papaila argued that because of "the homogenous nature of Japanese society," favored treatment of Japanese citizens results in "preferential treatment for individuals of Japanese national origin, effectively giving rise to discrimination on the basis of national origin and race." Papaila's Brief at 19-20. Here, however, Papaila only includes a statement of fact that the overwhelming majority of the population of Japan are of Japanese ethnicity. Petition at 6. However, Papaila never makes *any argument* regarding this homogeneity. Therefore, as such argument has not been briefed by Papaila, it has been waived. *Castaneda v. Partida*, 403 U.S. 482, 486 n.4, 97 S.Ct. 1272, 1276 n.4 (1977); Sup. Ct. R. 14.1(a). Regardless, Uniden America previously has demonstrated that the distinction is of no consequence. *See* Uniden's Brief at 13 n.14.

> The exercise of a treaty right may not be made the basis for inferring a violation of Title VII. . . . That right would be empty if the subsidiary could be punished for treating its citizen executives differently from American executives. . . . [If this were the result] Title VII would be taking back from the Japanese with one hand what the Treaty had given them with the other.

Id. at 393.

The *Fortino* court noted that in *Sumitomo Shoji* "there was no contention that the parent had dictated the subsidiary's discriminatory conduct. . . ." [11] As to the open question of whether the subsidiary could assert the parent's treaty rights, *Fortino* found that it could, because otherwise the FCN Treaty would be:

> set at naught. A judgment that forbids Quasar to give preferential treatment to its expatriate executives that its parent sends would have the same effect on the parent as it would have if it ran directly against the parent. . . .

Id.

In *Fortino,* the Seventh Circuit was greatly influenced by the fact that, like the case with Uniden America, the subsidiary had employees of Japanese "race" and national origin who were *not* expatriates, and who thus were treated no more favorably than their U.S. subsidiary counterparts whose ancestry originated in other parts of

---

[11] In his Petition, Papaila suggests (without supporting authority) that in the briefs and oral argument in *Sumitomo Shoji* the statement *was* made that the foreign parent controlled the expatriates sent to the United States subsidiary. Petition at 24. He then suggests that the contention implicitly was rejected by this Court. This is a specious argument. Merely mentioning a fact in a brief does not mean that the reviewing court *considered* all, or even any, possible ramifications of that fact. Clearly, this Court in *Sumitomo Shoji* did not believe that the issue of the subsidiary's right to invoke the parent's treaty privileges was before it—as the Court *expressly stated.* 457 U.S. at 181 n.19, 102 S.Ct. at 2382 n.19.

the world. These facts negated any inference that Quasar made distinctions upon Title VII's prohibited race or national origin grounds, as opposed to distinctions based on *citizenship* which clearly are permitted by the FCN Treaty. *Id.*

Like in *Fortino*, it is clear in the instant matter that the type of "discrimination" complained about by Papaila—involving as it does a handful of Japanese citizen expatriates sent by Uniden Japan to protect its shareholder interests—was *not* a violation of Title VII. The Fifth Circuit decision therefore was correct. *See also Starrett v. Iberia Airlines of Spain*, 756 F.Supp. 292 (S.D.Tex. 1989) ("of their choice" clause in treaty limited to discrimination in favor of nationals of the country of the parent).

b. *The District Courts' Rulings in* Spiess *and* Goyette *Do Not Mandate a Different Result*

Papaila cites only two District Court cases to support his contention that a U.S. subsidiary may not invoke the treaty rights of its parent. Each of these cases, however, is fundamentally distinguishable from the case at hand, and neither dictates a reversal of the Fifth Circuit.

The first case cited by Papaila is the unpublished District Court opinion reviewed by the court in *Spiess v. C. Itoh & Co., Inc.*, 725 F.2d 970 (5th Cir. 1984), *cert. denied*, 469 U.S. 829 (1984).[12] Papaila notes that the District Court ruled that it would not permit the American subsidiary of a Japanese corporation to assert the treaty rights of its parent because such a ruling would "accomplish indirectly what it cannot accomplish directly" under *Sumitomo Shoji*. *Id.* at 973. What Papaila fails to acknowledge is that, although the subsidiary argued that the personnel decisions in question had been man-

[12] The Fifth Circuit ruled that it did not have jurisdiction to review the District Court's decision. *Id.* at 971.

dated by the parent corporation, the District Court specifically found that "[t]he hiring questioned by plaintiffs in the instant case is that of Itoh-American [defendant]." *Id.* Thus, the District Court in *Spiess* found that the subsidiary was attempting to invoke the treaty rights of its parent with respect to its *own* personnel decisions. Here, however, there is *no* dispute that the challenged employment practices were dictated by the parent, Uniden Japan, *not* Uniden America.

The second decision cited by Papaila, *Goyette v. DCA Advertising*, 66 Fair Empl. Prac. Cas. (BNA) 1045 (S.D.N.Y. 1993) also is inapplicable. There, the District Court, relying on the Second Circuit's decision in *Sumitomo Shoji*,[13] held that the subsidiary could not assert the treaty rights of the parent because it had not shown that Japanese citizenship was a "bona fide occupational qualification." *Id.* at 1054. Here, Uniden America did not raise a BFOQ argument in its motion for summary judgment, and the issue therefore was not before either the District Court or the Fifth Circuit.[14]

2. *The Fifth Circuit's Decision Is Consistent With the Language of the Treaty*

Papaila makes a convoluted argument in his Petition that the "plain language of the Treaty does not indicate an intent to permit United States subsidiaries to invoke

---

[13] Another question left open by the Supreme Court in *Sumitomo Shoji* was "whether Japanese citizenship may be a bona fide occupational qualification ['BFOQ'] for certain positions [with the subsidiary] or as to whether a business necessity defense may be available." 457 U.S. at 189 n.19, 102 S.Ct. 2382 n.19.

[14] Interestingly, Papaila ignores the guiding principle behind *Goyette* which is that "as applied to a Japanese company enjoying rights under Article VIII of the [FCN] Treaty, [this exception to Title VII] must be construed in a manner that will *give due weight to the Treaty rights. . . .*" *Id.* at 1054 (quoting *Sumitomo Shoji*, 638 F.2d at 559) (emphasis added). Thus, the court in *Goyette* expressly recognized that the FCN Treaty does create an exception to Title VII.

the Article VIII(1) rights of their parents." Petition at 11. This argument is flawed at its inception.

First, there is no case law to support Papaila's tortured reading of the Treaty. In fact, the only decision which addresses the argument raised by Papaila adopts the opposite view. The Second Circuit opinion in *Sumitomo Shoji*, often relied upon by Papaila in his Petition, *rejected* the notion that "dramatic distinctions" should be drawn between "nationals," "companies" and "enterprises":

> It is illogical to infer that the drafters of the Treaty intended to make such a dramatic distinction between forms of business operation or to act in such a haphazard way.

Sumitomo Shoji, 638 F.2d at 556.[15] Thus, Papaila's construction of the Treaty lacks any case authority. Petition at 12.

More significantly, even if Papaila's construction is correct (which it is not), for purposes of the instant case

---

[15] The Second Circuit further explained the nonsensical results dictated by Papaila's interpretation of the Treaty:

> [I]f we were to accept [this] view . . . a crazy-quilt pattern would emerge. Under such a reading *Japanese branches* in the United States would be guaranteed "access to the courts of justice" (Article IV(1)), protected against "unlawful entry or molestation" (Article VI(2)), given the right to dispose of "property of all kinds" (Article IX(4)), allowed to obtain and maintain "patents of invention" (Article X), permitted to make "payments, remittances and transfers of funds or financial instruments" (Article XII(1)), and allowed to engage in "importation and exportation" (Article XIV(5)). *Japanese subsidiaries*, on the other hand, would not be guaranteed any of the rights conferred on Japanese branches operating in the United States, but would instead have to be content with national treatment in such areas as "the taking of privately owned enterprises into public ownership and . . . the placing of such enterprises under public control" (Article VI(4)).

Id. at 556. The Supreme Court did not address this statutory construction issue, and thus, under Papaila's own analysis, the Second Circuit opinion is persuasive authority.

it is an argument that leads nowhere. The end result of Papaila's analysis is that a subsidiary is not, *itself*, granted the protections of Article VIII of the FCN Treaty. But once again, *that issue is not before the Court!* Uniden America does not contend, and the Fifth Circuit did not hold, that as a subsidiary it is entitled to all of the rights enjoyed by its parent under Article VIII. What the Fifth Circuit held, consistent with the language of the Treaty, is that where a decision is made by an entity which *is* protected under Article VIII, then *that* decision carries the protection of the Treaty. Papaila simply refuses to discern the difference between conduct dictated by the parent and conduct initiated by the subsidiary. However, for the former, the Treaty attaches; for the latter, it does not.

3. *The Fifth Circuit's Decision Is Not in Conflict With Decisions of Other Courts*

In his Petition, Papaila incorrectly asserts that there is a conflict among the Circuits "as to the Rights of an American Based Corporation to assert the Treaty Rights of its Parent." Petition at 20. Specifically, Papaila contends that the Fifth and Seventh Circuits are in conflict with the Second Circuit on this issue, which was "Arguably Left Open" in the Supreme Court's *Sumitomo Shoji* decision. *Id.* Papaila's assertion is incorrect, and thus cannot serve as a basis for a writ of *certiorari*.

First, it is not even remotely "arguable" that the *Sumitomo Shoji* Court *did* in fact leave open the issue of whether a U.S. subsidiary may invoke the treaty rights of a parent. As explained *supra*, this Court clearly stated that it "express[ed] no view" on this issue. *Sumitomo Shoji*, 457 U.S. at 189 n.19, 102 S.Ct. at 2382 n.19.

Additionally, the Fifth, Seventh and Second Circuit Courts are in *accord* as to the extent of treaty protection. Indeed, the Second Circuit went even *further* and held:

> We are satisfied that the Treaty's provisions may be invoked by a wholly-owned Japanese subsidiary in-

> corporated in the United States to the same extent that they may be availed of by Japanese corporations or firms operating in the United States.

Sumitomo Shoji, 638 F.2d at 555-56.[16] It was this more expansive reading of the Treaty that was rejected by the Supreme Court. For Papaila to argue that the Second Circuit reads the scope of the Treaty more *narrowly* than does the Fifth Circuit is pure nonsense.

Thus, it is clear that all of these Circuit Courts have reached the *same* conclusion, *i.e.*, that the Treaty would be frustrated unless, in the circumstances of the case at bar, the U.S. subsidiary could assert the treaty rights of the parent. Clearly, there is no conflict to be addressed by a writ of *certiorari*.[17]

---

[16] It is unclear why Papaila cites the portion of the Second Circuit's decision in *Sumitomo Shoji* concerning the "freedom-of-choice" clause of the Treaty and the BFOQ clause of Title VII. Petition at 20-21. That discussion is completely irrelevant to the issue regarding which Papaila asserts the Circuits are in conflict.

[17] It also is unclear whether Papaila is asserting that there is some other conflict, as Papaila does not state what the conflict is. Clearly there is no conflict as to the BFOQ issue, as neither the Fifth Circuit nor the Seventh Circuit, *in any way*, addresses the applicability or scope of a BFOQ analysis in their decisions. Thus, nothing in the Seventh Circuit's *Fortino* or the Fifth Circuit's *Papaila* decisions conflicts with the Second Circuit's holding in *Sumitomo Shoji* that a Japanese company may make a BFOQ showing that the Japanese nationals are necessary to the business in the United States. *Sumitomo Shoji*, 638 F.2d at 559. There also is no conflict with regard to the "freedom-of-choice" clause. In *Sumitomo Shoji*, the Second Circuit held that that clause did not support "Sumitomo's broad interpretation, which carried to its logical conclusion, would immunize a party not only from Title VII but also from laws prohibiting employment of children, § 12 of the Fair Labor Standards Act, . . . laws granting rights to unions . . . and the like." 638 F.2d at 552. Thus, what the Second Circuit held is that there is not a complete U.S. employment law exemption for Japanese firms operating under the Treaty. *Id.* at 558. If the Fifth and Seventh Circuits had rendered the opposite conclusion, *i.e.*, if they had found a complete exemption, there might

IV. TITLE VII AND THE FCN TREATY MAY BE READ IN HARMONY BY EXCLUDING JAPANESE EXPATRIATES AS COMPARITORS UNDER TITLE VII

Papaila proposes a "harmonizing" interpretation of the FCN Treaty by which a Japanese corporation would enjoy the right to *place* expatriate employees with U.S. subsidiaries, but thereafter could not provide them any preferential treatment, including transfer back to Japan. Such an interpretation is fundamentally inconsistent with the balance of Papaila's arguments in his Petition and would frustrate the purposes of the Treaty.[18]

A. Papaila Acknowledges That the Treaty Grants Immunity From Title VII Under Certain Circumstances

After arguing throughout his Petition that the FCN Treaty was not intended to, nor does it, provide any kind of immunity from Title VII, Papaila makes a turnabout and proposes that the Treaty be read to allow "for the *limited* right of preferential placement of Japanese in-

---

arguably be a conflict. However, the Fifth and Seventh Circuits did *not* find such; rather, both courts limited the exception to situations where the parent dictates the complained-of conduct and only "to the extent necessary to prevent the treaty from being set at naught." *Papaila*, 51 F.3d at 55 (quoting *Fortino*, 950 F.2d at 393). Thus, these decisions are not in conflict.

[18] Papaila makes only a gesture towards preserving his argument, rejected below, that "where there is a conflict between the statute and the treaty, the last in time controls." Petition at 19. Because Papaila has not seriously briefed this issue, suffice it to say that Uniden America previously has explained that the widely recognized rule is that the last-in-time analysis is not to be applied *unless Congress clearly has stated its intention to repeal the former treaty. See Blanco v. United States*, 775 F.2d 53, 61 (2nd Cir. 1985) (citing *Posados v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 352 (1936) ("[t]he intention of the legislation to repeal must be clear and manifest")); Uniden's Brief at 17-20. Here, Papaila can point to no such intent, manifest or otherwise, and therefore his last-in-time analysis collapses.

dividuals into delineated positions of management and positions requiring technical expertise." Petition at 19. This is significant, in light of the fact that there is, and could be, no dispute that preferential placement of persons of a particular race or national origin otherwise would constitute a *per se* violation of Title VII. Yet Papaila seems unconcerned with this inconsistency in his arguments.

B. Papaila's "Harmonizing" of Title VII With the FCN Treaty Would Frustrate the Purpose of the Treaty

Papaila fails to explain how his reading of the statute and Treaty satisfies the purpose of the latter. As previously explained, the purpose of the Treaty is to provide a means by which Japanese corporations may "control" their investments in the United States. Papaila's reading, however, would eviscerate any control a Japanese parent might have over its U.S. subsidiaries. Were Papaila's interpretation to be adopted, it would mean that once Uniden Japan preferentially assigned an expatriate to Uniden America, that expatriate would come under the exclusive control of *Uniden America*. Uniden America then would be forced to treat the expatriates identically to all other employees in order not to run afoul of Title VII. The parent corporation could not make its own decisions regarding the pay, treatment, transfer, or recall of its expatriate employees. The result would be more akin to Uniden America "borrowing" expatriate employees than Uniden Japan assigning such expatriates to oversee its investments. Thus, Uniden Japan would be denied any real benefit from such an assignment, despite the provisions of the Treaty.

C. Papaila's "Harmonizing" of Title VII and the FCN Treaty Is Unsupported by the Case Law

Unfortunately for Papaila, his reading of the FCN Treaty is unsupported by the relevant case law. The lower courts consistently have held that when the FCN

Treaty can be applied, the Title VII immunities with respect to expatriate employees go beyond mere placement. Thus, in a portion of the Fifth Circuit's *Spiess* decision which is still good law, the court held:

> considering the Treaty as a whole, the only reasonable interpretation is that article VIII(1) means *exactly what it says:* companies have a right to decide which executives and technicians will manage their investments in the host country, without regard to the host country's [employment] laws.
>
> * * *
>
> Thus, we hold that the article VIII(1) "of their choice" provision permits Japanese companies to discriminate in favor of their fellow citizens.

Spiess v. C. Itoh & Co. (America), Inc., 643 F.2d 353, 361-62 (5th Cir. 1981) (emphasis added).[19] This completely destroys Papaila's tortured and nonsensical attempt to hedge his bets, *i.e.*, to argue that if Uniden America *can* assert the FCN Treaty right of Uniden Japan to "place" the expatriate, its right to "violate" Title VII *stops* once the expatriate has been sent to the U.S. subsidiary.

Indeed, a recent Third Circuit Court of Appeals decision squarely rejected Papaila's argument. *MacNamara*

---

[19] This was the initial decision entered by the Fifth Circuit in the *Spiess* case. Among several rulings in that case was one that a U.S. subsidiary of a foreign corporation could assert treaty rights on its own behalf. *Id.* at 363. That holding preceded this Court's decision in *Sumitomo Shoji*. For that reason, a short time after the *Spiess* opinion was rendered, it was appealed to the Supreme Court, vacated, and then remanded. 457 U.S. 1128 (1982). The Fifth Circuit never had to address the key issue in the case at bar, *i.e.*, whether and under what circumstances the U.S. subsidiary could assert the parent's treaty rights for decisions directed by the parent. However, there are *numerous* principles decided in *Spiess* that in other ways fully support the Fifth Circuit's subsequent decision in the instant case and remain good law, including those which are quoted in the text above.

v. Korean Air Lines, 863 F.2d 1135 (3rd Cir. 1988), *cert. denied*, 493 U.S. 944 (1989). There, as here, the plaintiff argued that a foreign corporation's right to "engage" executives of its choice did not "subsume or incorporate its decision to *terminate* him." *MacNamara*, 863 F.2d at 1141 (emphasis in original). In *MacNamara*, however, the Third Circuit agreed with the lower court's "reasoning that the concept of engagement necessarily included termination." *Id.*[20]

D. The FCN Treaty and Title VII May Be Read in Harmony by Excluding as Comparitors Under Title VII Expatriates Who Are Under the Control of the Parent

As demonstrated above, the relevant case law squarely rejects Papaila's attempt at harmonizing the FCN Treaty with Title VII. However, that does not mean that these cases do not themselves harmonize the two apparently conflicting laws, as did the Fifth Circuit decision below. As explained by Uniden America to the court below, there are several means of reconciling Title VII with the Treaty. Uniden's Brief at 21-24. In the decision below, the Fifth Circuit chose to harmonize the Treaty and the statute essentially by removing as "comparitors" for Title VII purposes expatriate personnel whose terms and conditions of employment are set by the parent corporation. *Papaila*, 51 F.3d at 56.[21] Thus, a U.S. citizen employed

---

[20] This further undercuts Papaila's imagined "conflict" among the Circuit Courts. Indeed, following this Court's decision in *Sumitomo Shoji*, every Circuit Court addressing the issue has held that the Title VII immunity under the FCN Treaties goes *beyond* mere placement. This was the conclusion of the Third (*MacNamara*), Fifth (*Papaila*), Sixth (*Wickes*), and Seventh (*Fortino*) Circuits. In the nearly fifteen years since it was reversed by the Supreme Court, the Second Circuit has not returned to this issue. Thus, there is unanimity among the Circuit Courts with respect to this point following the *Sumitomo Shoji* decision by this Court.

[21] The Fifth Circuit also noted with approval the citizenship versus national origin distinction urged by Uniden America, *i.e.*,

by the U.S. subsidiary of a Japanese corporation is assured of equal treatment as compared to all employees who are under the control of the subsidiary, including employees of Japanese "race" and national origin. That same employee may not, however, demand equal treatment with expatriate employees who are under the exclusive control of the parent corporation.

The conclusion reached by both the Fifth Circuit, as well as the Seventh Circuit in *Fortino*, neatly harmonizes the various strands of case law discussed herein. The purposes of the FCN Treaty are not frustrated by these decisions, as the parent corporation maintains its freedom to assign expatriate employees to its U.S. subsidiaries and to set the terms of their employment. At the same time, the U.S. subsidiary is fully bound by the laws of the United States, including Title VII, with respect to any decisions *it* makes with respect to *its* employees. Therefore, the decision of the Fifth Circuit below is proper and does not merit review by this Court.

E. The Decision Below Reflects Good Public Policy

Any attempt at harmonizing the FCN Treaty with Title VII should be consistent with the public policy concerns underlying the Treaty. Under Papaila's analysis: (1) Uniden Japan legally may assign an expatriate citizen "of its choice" to protect the assets invested in Uniden America, but then could not reassign or recall that expatriate to the home country if a non-expatriate with the same performance record would have been discharged under the same circumstances, and (2) Uniden Japan could not

---

that Title VII prohibits national origin discrimination, whereas the Treaty *allows* discrimination on the basis of *citizenship*. *Papaila*, 51 F.3d at 56 n.2. The courts in *Spiess*, *Fortino*, and *MacNamara* each based their decision, in part, upon such a distinction and found that since all of the allegedly favored individuals were *citizens* of the parent's home country, Title VII's principals remained intact.

differentiate in favor of expatriates on the basis of inducements and other benefits. If this were the case, then the parent company's willingness to invest its assets in the United States could be diminished significantly. Likewise, if Papaila's illogical view were to prevail, foreign nations may respond by placing similar "tit-for-tat" restrictions upon expatriates of U.S. companies. It was precisely this kind of jingoistic "trade war" that the FCN Treaty was negotiated to prevent. *Sumitomo Shoji*, 457 U.S. at 184-89, 102 S.Ct. at 2379-81.

CONCLUSION

An affirmance of the court below would mean only that Papaila could not use as "comparitors" the handful of Japanese expatriates sent by Uniden Japan to Uniden America to protect its assets. However, Papaila still *would* have the right to make such comparisons with every *other* Uniden America employee, *including* the six employees of Japanese "race" and national origin who are not expatriates. A reversal of the court below would set Article VIII(1) "at naught" and, Uniden America believes, could have serious repercussions upon international investments and trade. Therefore, Papaila's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD M. KOBDISH *
REBECCA A. SINGER
R. S. GHIO
FULBRIGHT & JAWORSKI L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201
(214) 855-8000
Counsel for Respondent
* Counsel of Record